

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN RESOURCES  
PROTECTION COUNCIL, CENTER  
FOR BIOLOGICAL DIVERSITY,  
AND LAURA GAUGER,

Plaintiffs,

Case No. 11-CV-045-BBC

vs.

FLAMBEAU MINING COMPANY,

Madison, Wisconsin  
May 24, 2012  
1:30 p.m.

Defendant.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF FOURTH DAY OF COURT TRIAL  
AFTERNOON SESSION  
HELD BEFORE THE HONORABLE BARBARA B. CRABB

APPEARANCES:

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Also Present: Fred Fox, Flambeau Mining

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(Called to order.)

MR. VAN CAMP: If it pleases the Court, I would like to put Mr. Christman on. It will just be momentary. And then he and Mr. Christianson can begin their trek back to Ladysmith. And I have talked to plaintiffs' attorneys. I don't believe they have an objection.

MS. MCGILLIVRAY: That's true. That's fine.

THE COURT: That's a good idea.

MR. VAN CAMP: Thank you.

**JACK CHRISTMAN, DEFENDANT'S WITNESS, SWORN**

DIRECT EXAMINATION

BY MR. VAN CAMP:

Q. Good afternoon, Mr. Christman.

A. Good afternoon.

Q. Would you please state your name for the record?

A. My name is Jack Christman. I live at W --

Q. Can I put the microphone over?

THE COURT: Yeah. That's best if you just scooch your chair up close. That's good.

JACK CHRISTMAN - DIRECT

1 A. My name is Jack Christman. I live at W-11123  
2 Highway 8; Bruce, Wisconsin.

3 Q. Where is Bruce?

4 A. About seven and-a-half miles straight west of  
5 Ladysmith right on Highway 8.

6 Q. I'd like to first show you an aerial photograph.  
7 There's a picture of it on the easel beside you, but I'm  
8 going to also put it on that screen that's right beside  
9 you --

10 A. Mm-mm.

11 Q. -- Exhibit 633. Is there a photograph -- wouldn't  
12 you know it. Let's go to 635. I've got an exhibit  
13 sticker right on top of it. I would like to draw your  
14 attention to the exhibit on the screen, which is Exhibit  
15 635. Do you recognize the area shown in that aerial  
16 photograph?

17 A. Yes.

18 Q. What is it shown in that photograph?

19 A. It shows the house that I built.

20 Q. Okay. If you take your finger and you actually push  
21 on the screen --

22 A. Yeah.

23 Q. -- you can draw a circle right around the house that  
24 you're talking about and it should come up in a color.  
25 So just put your finger on the screen and draw a circle

1 right around it. Do you see the circle on that screen?

2 A. Yeah.

3 Q. Okay. Is that a house that you built?

4 A. Yes.

5 Q. When did you build that house?

6 A. Oh, it was in the late 50's.

7 Q. And how long did you live in that house?

8 A. I built -- I moved out because of my option on my  
9 land and I built another house where I'm living now in  
10 1968, I think.

11 Q. Okay. When you lived in that house, what was on the  
12 property immediately to the north of your house?

13 A. Immediately to the north?

14 Q. Yes.

15 A. It was a line fence between me and my neighbor,  
16 Stanley Mazinski. He had a farm there.

17 Q. Okay. I would like to show you now another  
18 photograph, Exhibit 554. Can you move that up so we can  
19 see? Do you see a photograph? We have moved it up on  
20 your screen so you can see the lower right-hand corner of  
21 that?

22 A. Yes.

23 Q. Do you see buildings down in the corner?

24 A. Yes.

25 Q. Can you tell us what those buildings are?

1 A. Well, the first building right here, that's where my  
2 driveway came in and I had a shop there. And then right  
3 to the north of that, that was a machine shed. And then  
4 of course it was my neighbor's barn and his garage is up  
5 here. His house was over here. And the line fence that  
6 I had talked about was right through there, right on this  
7 tree line, just this side of his machine shed and just  
8 north of my garage.

9 Q. Okay. And how long was that farmyard on the  
10 property north of yours and what happened to it and when  
11 did that happen?

12 A. The buildings?

13 Q. Yes.

14 A. They were destroyed when the mine bought that option  
15 of that land.

16 THE COURT: And when you say you optioned it,  
17 was that the same thing as selling all of it?

18 THE WITNESS: Well, they put an option when they  
19 came in, they put an option to buy.

20 THE COURT: Mm-mm.

21 THE WITNESS: And when they started mining or  
22 when they started in the construction, on the north side  
23 of this line fence divided -- this was my woods in here  
24 and of course this was Stanley's farm and the mine  
25 naturally was up in this area. And his buildings were

1 tore down because they didn't want them. And that's  
2 where they put Copper, oh, just inside of the line here,  
3 Copper Lane, within there.

4 THE COURT: Oh, Copper Park Lane?

5 THE WITNESS: Copper Park Lane, yeah.

6 BY MR. VAN CAMP:

7 Q. Did you draw a line where Copper Park Lane is now?

8 A. Oh, it's approximately. I got it kind of a  
9 ziggy-zag there.

10 Q. Okay. Did you ever work for Flambeau Mining  
11 Company?

12 A. Yes.

13 Q. Okay. And during what period of time?

14 A. I started part time with them helping a fellow that  
15 I had worked for him for several years and that would  
16 have been in the late 60s, early 70s.

17 Q. And how long did you work for them?

18 A. Well, I worked for them part time. And then after  
19 they got -- they started in the mining operations, I got  
20 a full-time job with them. I mean, if I call my  
21 part-time years. I mean, it was, you know, just hit and  
22 miss. But when I started -- I can't just remember the  
23 year that they opened the mine. What was it, '60 -- or  
24 '80, somewhere in the early 80s -- I went full time with  
25 them. No, no, late 80s.

1 Q. And then how long did you stay working with them?

2 A. Well, I stayed working with them to when the mine  
3 was reclaimed in '97. I stayed on with them for, oh,  
4 probably -- I can't remember exactly. It's a long time  
5 ago -- six, seven years.

6 MR. VAN CAMP: Okay. Your Honor, I have no  
7 further questions for this witness.

8 MS. MCGILLIVRAY: No questions, Your Honor.

9 THE COURT: Thank you.

10 MR. VAN CAMP: Thank you, very much.

11 THE WITNESS: Thank you.

12 MR. VAN CAMP: And I assume he can be excused?

13 THE COURT: Yes. You are excused.

14 THE WITNESS: Thank you.

15 MR. VAN CAMP: I would like to offer 635 and  
16 554.

17 THE COURT: Any objection?

18 MS. MCGILLIVRAY: No.

19 THE COURT: Received.

20 MR. VAN CAMP: I would like to recall Mr. Fox.

21 THE COURT: All right.

22 DIRECT EXAMINATION

23 (Continued from recess.)

24 BY MR. VAN CAMP:

25 Q. Could you tell us whether or not Flambeau Mining



1 Company would have requested the reclamation modification  
2 if it hadn't been for requests by the local community for  
3 the use of those buildings?

4 A. They would not have.

5 Q. Did the mining company continue to use any of those  
6 industrial buildings after the industrial outlot was  
7 created?

8 A. Not that I know of.

9 Q. The only building -- now, do you know what's being  
10 done with the house that Mr. Christman built back in the  
11 50's?

12 A. It is the environmental reclamation manager's  
13 office.

14 Q. And whose office would that be?

15 A. Ms. Murphy's.

16 Q. Okay. And that's -- is that north or south of  
17 Copper Park Lane?

18 A. It would be south.

19 Q. In the oversight you had of the Flambeau Mine site  
20 in Ladysmith, did you ever conduct any studies or audits  
21 of that property?

22 A. I can recall two audits that were conducted during  
23 my tenure as the director of Health Safety Environment  
24 Reclamation.

25 Q. And when were those audits?

1 A. My recollection would be 1997, just as the backfill  
2 process was finishing up, and 2005 after reclamation was  
3 complete and we were looking forward to -- I think we  
4 already received a notice of completion and looking  
5 forward to obtaining a certificate of completion from the  
6 project.

7 Q. Okay. What is that certificate of completion that  
8 you just mentioned?

9 A. It is a, I think, a major milestone in the  
10 reclamation progress of the site. It's a -- by law, it's  
11 a -- first of all, you reclaim the property. And when  
12 you feel you have stabilized the ground and the  
13 revegetation is following suit with what your plans are,  
14 you apply for a notice of completion, which means  
15 basically what it states -- you notice the state that  
16 you're complete with your reclamation.

17 Then there's a four-year, from the time you -- if  
18 it's granted, which it was, and I can't remember the  
19 exact date that that happened, but it did happen, so we  
20 obtained the notice of completion accepted by the  
21 Wisconsin Department of Natural Resources. And then it's  
22 four years of monitoring of the site conditions,  
23 reporting with the reports that you heard about to the  
24 Department of Mining.

25 And once you can prove that the -- nothing has

1 changed, you know, since -- within that four-year period,  
2 you can apply for a certificate of completion, with I  
3 guess I compare it to the equivalent of getting a  
4 diploma. But it's a certificate notifying you that you  
5 have completed what you intended way back when you  
6 drafted up your reclamation plan.

7 Q. And what property or what area was included within  
8 the area covered by that certificate of completion?

9 A. The entire reclaimed mine site, which would have  
10 been 181 acres, which did include at that time the 32  
11 acres that is now called the *industrial outlot*, so we  
12 were looking for the certificate of completion for the  
13 entire 181 acres under permit.

14 Q. Okay. And something happened along the way so that  
15 that was changed, correct?

16 A. Correct.

17 Q. And what happened and what was changed?

18 A. During the hearing, I believe that was a contested  
19 case hearing which addressed the obtaining the  
20 certificate of completion, there were objections, if you  
21 will, from some of those in the audience, including one  
22 of the plaintiffs, that the certificate of completion  
23 should not include the 32-acre industrial outlot due to  
24 the fact that there were -- which has been, you know,  
25 discussed during the trial -- copper concentrations in

1 the influent and outfluent or effluent of the storm water  
2 management structure.

3 And also at that time -- I can't remember the date,  
4 but prior to the certificate of completion -- you'll  
5 remember John Coleman and GLIFWC, *Great Lakes Indian Fish*  
6 *and Wildlife Commission*, had noticed the Department that  
7 there were copper concentrations in Stream C, which I  
8 can't define at this time, that exceeded the state's  
9 fresh water quality standards and he was demanding that  
10 the Department of Natural Resources take some action.

11 And because of all this going up to obtaining the  
12 certificate of completion, the company decided to listen  
13 to those concerned about the outlot and to get in a room  
14 and we drafted up a stipulation to obtaining the  
15 certificate of completion. And that carved out the 32  
16 acres from the 181 acres, meaning that we then were at  
17 the hearing to apply for the certificate of completion  
18 for a major portion of the reclaimed mine site, but not  
19 the industrial outlot, which we're talking about this  
20 week.

21 Q. Just generally, who were the parties in these  
22 discussions or negotiations that you just described?

23 A. This is -- I can recall, you know, from what I can  
24 recall, it would be of course Flambeau Mining Company  
25 represented by myself, attorneys, and I can't remember if

1 Ms. Murphy was part of that. I believe the Department of  
2 Natural Resources, if it was their attorney represented  
3 there. The parties who were concerned were in the room.  
4 I can't remember if there was anybody else, but that's  
5 basically -- you know, Flambeau Mining Company, its  
6 attorneys; I'm sure there was an attorney, and I don't  
7 know if there was a technical rep, for DNR; and the  
8 plaintiffs, whoever they were represented by at that  
9 hearing.

10 Q. Okay. When you say "the plaintiffs," you mean the  
11 plaintiffs in this lawsuit?

12 A. It would be Ms. Gauger. And I don't think any of  
13 the other groups here were even part of the deal at that  
14 time.

15 Q. And what do you recall being discussed at the  
16 negotiation, you know, around the COC or the certificate  
17 of completion, what was actually involved in those  
18 negotiations?

19 A. Well, I don't think the reclaimed mine site was of  
20 issue at that time. Everyone seemed to agree, you know,  
21 that certificate of completion should apply to the site  
22 that has been reclaimed back to its original condition.  
23 But certain concerns over the industrial outlot were  
24 identified and specifically where the concentration of  
25 copper were coming from. I think there also were

1 concerns maybe there's other areas in the reclaimed mine  
2 site that might have some copper concentration.

3       So those issues were discussed and the stipulated  
4 order basically identified those areas of concern. They  
5 weren't specific sample points. For example, for  
6 whatever reason, the H&H building seemed to keep coming  
7 up. Someone had a concern that there was some soil  
8 contamination around the H&H building. Well, part of the  
9 stipulation was to sample soils within the area of the  
10 H&H building. There wasn't a plan or anything; there was  
11 this general concept.

12       I believe Intermittent Stream or drainage area now A  
13 and B, which were drainages within the reclaimed mine  
14 site, were part of that concern. Maybe a wetland I  
15 believe was part of -- you know, the water quality in one  
16 of the wetlands was a concern. Definitely the biofilter  
17 above and below and Stream C were of a concern, so all of  
18 those things were part of that stipulation.

19 Q.   Okay. Was there a discussion at all about the water  
20 treatment facility?

21 A.   Which one?

22 Q.   The one at the mine site, the water treatment  
23 facility that was decommissioned.

24 A.   Yeah, it was already -- it was gone at that time, so  
25 I don't believe, except for, you know, I guess

1 reminiscing back to why we got to a biofilter, et cetera,  
2 I really don't recall.

3 Q. Okay. And in the testimony that you've heard in  
4 trial, there was some discussion about the stipulated  
5 monitoring of water, of surface water and ground water.  
6 Specifically regarding surface water, what happened in  
7 these negotiations that led to a stipulation about  
8 surface water sampling?

9 A. Well, like I've mentioned in general terms, these  
10 areas were discussed and then put into the stipulation, I  
11 believe, that these areas will be sampled, probably even  
12 the frequency of sampling, and in what period they will  
13 be sampled over. I believe it was maybe up to four years  
14 you will do this, you will sample this area.

15 And then that's where Foth would be commissioned to  
16 develop a plan to go and present to the Department of  
17 Natural Resources and as part of the stipulation to get  
18 approval to go sample, you know, specific points that  
19 were in that plan.

20 Q. Okay. And was that plan then agreed to by the  
21 parties?

22 A. I believe it was, yes.

23 Q. And after that, was a certificate of completion  
24 received for everything except this industrial outlet?

25 A. Yes. The drafting the plan, getting it approved and

1 all that, I believe the certificate of completion was  
2 actually granted at that hearing. But it was  
3 stipulated -- you know, the stipulation came out of that  
4 and then went forward addressing the industrial outlet.  
5 That's my recollection of it.

6 Q. Okay. Now, let me take you back to the audits that  
7 brought us to the certificate of completion discussion.  
8 Tell us about the audits. What's involved in one of  
9 these annual audits? I don't mean annual audits; the  
10 audits that you talked about that you participated in.

11 A. Oh, yeah. These audits were not just for Flambeau.  
12 Part of the corporate environmental management system and  
13 our policies say that we will insure that there's  
14 compliance and that there's, you know, adherence to the  
15 standards and procedures for health, safety and  
16 environment. So the auditing system was sort of a  
17 program at the corporate office which dealt with all of  
18 the operating and closed properties and Flambeau was part  
19 of that auditing process as one of the sites.

20 What would happen, and I generally was the lead  
21 auditor, I had the certification under ISO 14001 as an  
22 auditor and I would call together a team. And we did  
23 them more frequently on operating properties, probably  
24 every three years. But here at Flambeau, I mentioned  
25 1997 I think and 2005, so there was a gap there, but the



1 reason was because we were just beginning the reclamation  
2 phase in 1997. We were going through the notice of  
3 completion, et cetera. We were waiting for time, but we  
4 were heading into this certificate of completion. It  
5 seemed like a good time to pull together an audit of  
6 where we were in 2005 before we applied for this  
7 certificate of completion, so that's the rationale for  
8 the dates.

9       And because it was reclaimed property, usually at an  
10 operating property we would pull together a team of just  
11 maybe five people that had expertise in a different area,  
12 one area like maybe air, another area solid and hazardous  
13 waste, another area would be reclamation; another area  
14 would be water, surface and ground water expertise, that  
15 kind of thing. And those people would go out, and if  
16 they felt comfortable with their assignments, would go  
17 out and audit those particular areas.

18       Now, at a reclaimed property, you didn't have that  
19 much activity going on. So we had, in this case I can't  
20 remember the number of people in the '97 audit, but I'll  
21 guarantee it was more than the two people, myself and an  
22 attorney I hired to be the auditors of Flambeau in 2005.  
23 That's the process.

24       Now, what we did is we split up. In terms of the  
25 specific to Flambeau in 1997, I'm not clear, but there

1 were different areas. The backfill was a big issue then,  
2 so we had a geochemist on that. And we had other people  
3 looking at different areas in 1997 and 2005, two people,  
4 myself and this attorney.

5 I directed, by activities, to the health, safety and  
6 communities, because we did have a communities function  
7 in these audits. And the attorney, who had experience in  
8 the Clean Water Act and water issues, was assigned to  
9 look at, like, I think things like the spill prevention  
10 control plans. He'd look at surface water monitoring,  
11 those types, and the ground water I'm pretty sure he  
12 looked at. So that's how we kind of divvied them up and  
13 kind of performed the auditing.

14 Q. What was the purpose, what was the sort of overall  
15 objective, of these audits?

16 A. First and foremost, it was compliance in the sense  
17 to insure the operations were operating in compliance  
18 with our corporate -- first of all, our policy and then  
19 our standards and procedures. And part of that would be  
20 compliance with regulatory requirements to bring back to  
21 the corporate office an assurance that the operations are  
22 complying with what we expected and in terms of our  
23 policies, standards and procedures.

24 When we found, let's say, noncompliance -- and that  
25 doesn't mean in the regulatory sense, but that there were

1 issues with policies and standards and practices -- we  
2 would put findings down. And if it was a regulatory  
3 compliance, we would put findings, and we classified the  
4 findings. And all of this is under Rio Tinto  
5 environmental guidelines, so there's guidelines that  
6 spell out all of the areas I'm covering.

7 And that's why we get to the point where if we had a  
8 finding, it was a high finding, and that's subjective, it  
9 would be written up as a high finding. If it was sort of  
10 something that could be addressed within -- and the high  
11 finding would, you know, we would require it to be  
12 addressed immediately.

13 With a moderate finding, it would be something, you  
14 know, maybe within one or two years this is an issue that  
15 should be fixed, but it's not of critical importance.

16 And then there were low, which kind of dragged  
17 along. And a lot of them that did pertain to the low  
18 issues were closure issues, something that's going to  
19 come back and needs to be addressed, you know, within a  
20 one to five-year period, if that makes any sense.

21 Q. Okay.

22 A. And with the findings, if you want me to continue,  
23 the findings were then tabulated. And this is generally,  
24 you know, within a form. And they were identified in  
25 this form to be addressed by the site, obviously, with an

1 action plan, how are they going to address this  
2 particular finding -- high, medium or low.

3 And that then became the audit report, which the  
4 distribution was very limited: it was to the site  
5 manager, it was to myself; it was to people who were  
6 working on -- you know, should be working on -- these  
7 action plans, the environmental staff at the different  
8 properties; and sent to my boss.

9 And it was recorded also on a system that ended up  
10 in London, so we had it tracked by our corporate owner,  
11 Rio Tinto. They were involved in tracking these issues,  
12 insuring that they would not just hang out there and not  
13 be addressed because frankly, it's a corporate  
14 reputational issue as well if you have certain things  
15 that aren't getting addressed.

16 And you heard the culture, you know, that I was  
17 proud to listen to with a few of the witnesses earlier.  
18 That's embedded in all these policies, standards,  
19 practices and procedures. You heard about how up and  
20 foremost would be the health and safety. That's obvious.  
21 We don't want injuries to our employees. We want happy  
22 employees. We want people who want to work for Kennecott  
23 Minerals and different operations. And the environment  
24 was right up there in terms of priorities, so this is how  
25 we prioritized things.

1 Q. Thank you. Did you have any responsibilities  
2 regarding review of financial information regarding  
3 operations at Flambeau Mine site?

4 A. Certainly not the accountant-type financials, I  
5 wasn't involved in that, but I was involved in helping  
6 prepare annual. And we went out to five-year-plan  
7 budgets for every one of our properties, including  
8 Flambeau, in addressing, you know, what issues need to be  
9 addressed, how much is it going to cost, and then you  
10 project out the cost and put it into your budget.

11 It's either, you know, obviously these critical or  
12 what I call *high issues* were going to be addressed  
13 immediately. Everything cost money. So we budgeted  
14 those issues and got approval for it overall; health,  
15 safety, environmental quality budget; for the -- by  
16 department.

17 And then I was, when, in the case of Flambeau, when  
18 Ms. Murphy's supervisor on site left, retired, and she  
19 was basically left alone there, she would present an  
20 annual budget to me and that's how it filtered into the  
21 corporate budget.

22 And, also, she would submit expenditures that she  
23 had to, you know, write checks for or however. She  
24 basically sent the bills to me. She didn't write the  
25 checks, but she sent the bills to me with her approval.

1 And then I looked them over and I approved them and I  
2 sent them into our accountants, so whatever the vendor  
3 would get paid. So that's kind of -- I did oversee the  
4 expenditures of Flambeau environmental safety and health  
5 expenditures since the direct supervisor left, retired.

6 Q. Okay. I would like to show you an exhibit. This is  
7 Exhibit 589.

8 A. It's got these wiggly lines.

9 Q. Exhibit 589.

10 A. Okay.

11 MR. VAN CAMP: Your Honor, these are financial  
12 records of Flambeau Mining Company and we would request  
13 that they be introduced in confidence and ask --

14 THE COURT: How do you want to do that?

15 MR. VAN CAMP: Well, I hate to say it, but I  
16 think --

17 THE COURT: Clear the courtroom?

18 MR. VAN CAMP: -- I need to clear the courtroom.  
19 I will make this as quick as I can.

20 THE COURT: All right.

21 MR. VAN CAMP: And we will invite people in  
22 after that, but I'm afraid I have to maintain the  
23 confidentiality of these documents.

24 THE COURT: That's fine.

25 MR. VAN CAMP: And I think, because Jana is part

1 of this, maybe she can stay. I will let that be up to  
2 the judge.

3 THE COURT: That would be fine. Is there any  
4 reason why Ms. Murphy should leave the room?

5 THE WITNESS: I don't know what he's going to  
6 show. I don't think so, no. She has been privileged to  
7 every --

8 MR. VAN CAMP: Well, we can -- do you mind  
9 stepping out?

10 MS. MURPHY: I don't mind.

11 MR. VAN CAMP: Then we don't even have to  
12 address that issue.

13 THE WITNESS: Maybe I shouldn't even see them.  
14 I don't know.

15 BY MR. VAN CAMP:

16 Q. Okay. Would you take a look, please, at Exhibit  
17 589?

18 THE COURT: Just a minute. I will just note  
19 that the court reporter will just note this portion of  
20 the transcript will be filed under seal.

21 MR. VAN CAMP: Thank you, very much.

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3 THE COURT: So can we bring everybody else back  
4 in the courtroom?

5 MR. VAN CAMP: Sure.

6 THE COURT: Okay.

7 BY MR. VAN CAMP:

8 Q. Mr. Fox, in addition to the things that we've  
9 already heard -- you've been sitting in court, you've  
10 heard the testimony of other individuals -- are you aware  
11 of other contributions that haven't been mentioned that  
12 Flambeau Mining Company made to the local community?

13 A. I know there have been a number of them. But one  
14 that stands out most to me that hasn't been mentioned was  
15 a contribution, basically a commitment, by the president  
16 of the company written to the Department of Natural  
17 Resources that Flambeau Mining Company would keep the  
18 river bank properties that they owned -- and this  
19 wouldn't just be within the active mining site, but  
20 within the entire property package which goes both north  
21 and south of the areas that you see where the mine was  
22 located -- to keep the river bank properties in an  
23 undeveloped state. In other words, we wouldn't carve it  
24 out and sell it off as prime real estate, which was  
25 going.

1           And the whole idea there was to protect the stream  
2 bank and the water quality of the Flambeau River. That's  
3 one contribution that hasn't been mentioned. I can't  
4 put, you know, a value on it. I know there's a social  
5 value alone, let alone a monetary value.

6           THE COURT: Well, that raises a question: Does  
7 Flambeau still own that piece of property that's been  
8 reclaimed, the 140 acres or whatever it is now?

9           THE WITNESS: Definitely. We own that plus  
10 there's a property package that some of it goes north and  
11 some of it goes south of that area that you're familiar  
12 with with the mine. We own or Flambeau still owns that  
13 land and pays property taxes on it.

14           THE COURT: And the agreement to keep the banks  
15 free from development is in perpetuity or for --

16           THE WITNESS: Yes.

17           THE COURT: As long as Flambeau owns it?

18           THE WITNESS: Well, it's that we won't sell it.  
19 It's to keep that land in ownership in perpetuity. And  
20 the idea there is to look long range with the city of  
21 Ladysmith and possibly Rusk County to extend the city's,  
22 they call it, the *River Trail*, the River Trail that they  
23 already -- is existing in the city of Ladysmith and  
24 extend it down and around and have a dedicated trail  
25 system for people to enjoy forever. It's, like, to me,

1 it would be like a state park or something like that.

2 There's others but, that one stands out that hasn't been  
3 mentioned.

4 Q. And does Flambeau Mining Company, do you know  
5 whether or not they still pay real state taxes on that  
6 property?

7 A. Absolutely.

8 MR. VAN CAMP: I have no further questions for  
9 this witness.

10 THE COURT: Mr. Cassidy.

11 MR. CASSIDY: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. CASSIDY:

14 Q. Just since we're talking about Flambeau pays real  
15 estate taxes on that property, do you know the  
16 approximate value of the property?

17 A. I do not.

18 Q. And I think you just told the Court that that --  
19 that the agreement was to keep that property in tact and  
20 not be sold and that is in perpetuity?

21 A. This would be the river bank property. Now, is that  
22 defined, no, but it's the property Flambeau owns along  
23 the river to keep that out of development, to protect the  
24 river bank itself and the quality of the Flambeau River  
25 forever. The commitment is to do that.

1 Q. And what -- how is that commitment memorialized?

2 A. In a letter from the president of Kennecott Minerals  
3 to someone in the Department of Natural Resources.

4 Q. And when did that -- when was that letter sent?

5 A. I don't know the exact date. I could guess.

6 Q. What year?

7 A. I would guess -- I've got to think here.

8 Q. Approximately.

9 A. Yeah. Oh, I'll bet -- I'll say 2000 -- probably  
10 2005. 2004 to 2006 period, something like that.

11 Q. You're not sure though?

12 A. No.

13 Q. And the property that's actually referenced in that  
14 letter has not been defined?

15 A. It's defined as -- I don't know the exact definition  
16 either, so it has not been plotted out, surveyed or  
17 defined in that means. It was a narrative commitment.

18 Q. So it was a narrative letter to DNR saying, "We  
19 promise not to develop this property," essentially?

20 A. Yes.

21 Q. So it's not a binding commitment on Kennecott  
22 Minerals?

23 A. It's -- I think from what we see, it would not be  
24 very good to retract from it, let's put it that way.

25 Q. So the answer is yes, it's not a binding commitment?

1 A. I don't know.

2 Q. You raised it in response to Mr. Van Camp's  
3 question. So you don't know whether it's a binding  
4 commitment or not; is that right?

5 A. It's a written letter to the Department of Natural  
6 Resources with the president's signature on it committing  
7 to not develop -- that Flambeau will not develop its  
8 river bank property; that's what it is.

9 Q. Okay. Does Kennecott Minerals own the property or  
10 does Flambeau Mine own the property?

11 A. We can go through the ownership I guess structure,  
12 but Flambeau Mining Company was a wholly-owned subsidiary  
13 of Kennecott Minerals Company, which is a wholly-owned  
14 subsidiary of Rio Tinto, PLC.

15 Q. So does that mean Rio Tinto owns the property?

16 A. Ultimately the ownership is Rio Tinto.

17 Q. And where is Rio Tinto located?

18 A. It's headquartered in London, UK.

19 Q. And where is Kennecott Minerals located?

20 A. Kennecott Minerals Company was located in Salt Lake  
21 City, like I said, Utah. Right now I don't know the  
22 legalities, but I don't believe Kennecott Minerals  
23 Company is an entity anymore.

24 Q. You mentioned you're a consultant now for Flambeau  
25 Mine Company?

1 A. Yes.

2 Q. And you're being paid for your testimony here today?

3 A. Yes, I am.

4 Q. What's your rate? What rate are you being paid?

5 A. \$2,000 a day.

6 Q. And that's what you've been being paid this whole  
7 time you've been here for the trial?

8 A. Yes.

9 Q. I think you mentioned earlier in your testimony  
10 before lunch, BMPs. Do you remember talking about BMPs?

11 A. I do, best management practices.

12 Q. And you talked about best management practices  
13 coming into effect after the WPDS permit was terminated,  
14 right?

15 A. They had been in practice within the reclamation  
16 plan for other portions of the reclaimed property. But  
17 they, once the treatment plant was taken out and there  
18 was no more method to treat storm water in the industrial  
19 outlet, then they applied to the industrial outlot.

20 Q. Okay. So before that, there were actually numeric  
21 effluent limits that applied to that area for discharges,  
22 correct?

23 A. What area?

24 Q. Well, that applied to the mine. That's what the  
25 permit said?

1 A. Yes, when the treatment plant existed, yes.

2 Q. And best management practices are not the same as  
3 numeric effluent limits; is that right?

4 A. That's correct.

5 Q. Okay. Mr. Van Camp asked you some questions about  
6 audits; do you remember that?

7 A. Yes, I do.

8 Q. And he asked you a question about an audit -- he  
9 asked you some questions about an audit you did in 2005?

10 A. I think I mentioned, you know, that an audit was  
11 done in 2005.

12 Q. Okay. I'm going to show you what's marked Exhibit  
13 4. Do you see that on your screen?

14 A. Yes.

15 Q. And do you recognize that document as the 2005 audit  
16 you were discussing with Mr. Van Camp?

17 A. I guess you can just turn it over to the next page  
18 and it will tell you. Okay. Yeah, maybe the next page  
19 because somewhere it will just say that's where the --  
20 yeah, July 30th. That's the audit, yes.

21 Q. And one of the issues in that audit was Intermittent  
22 Stream C water quality, correct?

23 A. I remember, yes.

24 Q. And you had talked about sort of a ranking of  
25 issues -- high, medium, low -- and what those

1 designations meant. What did high mean? I think you  
2 said that was something we were going to take care of  
3 immediately?

4 A. Address, yes.

5 Q. So --

6 A. That helps.

7 Q. I'll show you page 1 of the audit of Exhibit 4.

8 Does this indicate -- the area we're talking about here  
9 is Intermittent Stream C water quality and you identified  
10 it as a regulatory issue of high importance?

11 A. Yes.

12 Q. And what did you mean by "regulatory issue?"

13 A. Well, there are two categories, regulatory or  
14 management. And this pertained to the regulatory issue  
15 because it involved the input to the biofilter, being  
16 there's copper levels indicated, you know, high levels,  
17 areas of concern. It was part of the reclamation plan  
18 regulatory-wise, so it's a regulatory issue.

19 Q. Okay. And under the *Comments and Recommendations*  
20 down at the third paragraph it says, "Flambeau should try  
21 to address the Intermittent Stream C issue with the DNR  
22 prior to asking the DNR to issue a Certificate of  
23 Completion and reduce the Mine's reclamation bond.  
24 Flambeau also needs to insure that storm water discharge  
25 into Stream C continues to be authorized by the Mine's



1 Reclamation Plan since the Reclamation Plan requirements  
2 are likely more favorable to the Mine than what would be  
3 contained in a WPDES permit." Did I read that correctly?

4 A. Yes.

5 Q. And by more "favorable to the Mine," you meant less  
6 stringent, correct?

7 A. Well, first of all, that's not my words in that  
8 audit. That was co-authored by -- I think I mentioned  
9 there was an outside attorney and he did the commenting  
10 and recommendations for the environmental side of the  
11 auditing and I did the health, safety and community side.  
12 So it's not my -- those are not my words, although they  
13 are in the audit.

14 Q. They are Flambeau's words?

15 A. They are words of an audit -- a co-authored auditor.  
16 They're not Flambeau's words.

17 MR. VAN CAMP: Your Honor, at this time I would  
18 like to renew the request of Flambeau Mining Company to  
19 claw this document back.

20 THE COURT: I'm sorry. What?

21 MR. VAN CAMP: Claw the document back. This has  
22 been the subject of briefing and so forth. The testimony  
23 makes it clear that this is language of a  
24 privately-engaged attorney and I would ask that it be  
25 reconsidered at this time and that Flambeau be permitted

1 to claw it back.

2 THE COURT: Well, I'm not going to change that  
3 ruling, but I certainly will take into account the fact  
4 that this was written by somebody who was an outsider for  
5 the purposes of the audit.

6 MR. VAN CAMP: Thank you, very much, Your Honor.

7 BY MR. CASSIDY:

8 Q. And that person who wrote this was retained by  
9 Flambeau to do this work?

10 A. He was retained by Kennecott Minerals Company to do  
11 the work, the corporate office.

12 Q. The parent company to Flambeau?

13 A. Yes.

14 MR. CASSIDY: Your Honor, we move Exhibit 4 into  
15 evidence.

16 MR. VAN CAMP: I have the same objections.

17 THE COURT: Overruled and received.

18 MR. CASSIDY: Thank you, Your Honor. Nothing  
19 further of this witness.

20 THE COURT: Mr. Van Camp, anything else?

21 MR. VAN CAMP: Nothing further. Thank you.

22 THE COURT: You may step down.

23 THE WITNESS: Thank you, Your Honor.

24 MR. VAN CAMP: Mr. Lynch.

25 THE COURT: Mr. Van Camp.

1                   **LAWRENCE LYNCH, DEFENDANT'S WITNESS, SWORN**

2                                   DIRECT EXAMINATION

3 BY MR. VAN CAMP:

4 Q.     Good afternoon.   Would you please introduce  
5 yourself?

6 A.     My name is Lawrence John Lynch.

7 Q.     And where do you live Mr. Lynch?

8 A.     I live in Madison, Wisconsin.

9 Q.     How are you employed?

10 A.     I am currently a hydrogeologist with the Wisconsin  
11 Department of Natural Resources.

12 Q.     How long have you been employed by the Wisconsin  
13 Department of Natural Resources?

14 A.     I started with the Department in the fall of 1980 as  
15 a limited-term employee for one year and I became  
16 permanent in the fall of 1981.

17 Q.     Since 1980, what types of work have you done with  
18 the Wisconsin Department of Natural Resources?

19 A.     From 1980 until early 2006 I was in the metallic  
20 mining program in the Department.   I started out as an  
21 environmental specialist, which then transformed into a  
22 hydrogeologist position, and in the mid 90's I was made  
23 the mining team leader.

24 Q.     Just --

25 A.     Well, then since February of 2006 I have been a

LAWRENCE LYNCH - DIRECT

1 hydrogeologist in the Department's drinking water and  
2 ground water program.

3 Q. From 1980 until 2006, when you say you were in the  
4 metallic mining program department, what types of things  
5 were you responsible for in that position?

6 A. Well, at that time we had a number of permitted  
7 mining sites in the state, so I was responsible for  
8 conducting inspections and surveillance of those sites.  
9 I was also responsible for reviewing mining proposals.

10 At the time when I started with the Department there  
11 was a large underground mining proposal in the northeast  
12 part of the state. So it was reviewing proposed mines  
13 for compliance with the mining rules and laws,  
14 determination of environmental impacts, preparing  
15 portions of environmental impact documents and, as I  
16 said, conducting surveillance at active mines.

17 Q. What did the surveillance involve?

18 A. It would mainly involve conducting site inspections  
19 to determine compliance with permit conditions on  
20 reviewing monitoring data, primarily ground water and  
21 surface water monitoring data.

22 Q. And then when you moved into hydrology, what was  
23 involved in that change?

24 A. I was doing hydrogeology all along. It was just a  
25 matter of the state civil service classifications changed

1 and they developed a formal classification for  
2 hydrogeologist sometime in the late 1980s, so my  
3 classification became hydrogeologist. So the duties  
4 really didn't change; it was just the classification  
5 changed.

6 Q. And then I believe you indicated that there was a  
7 more substantial change in 2006; is that correct?

8 A. In 2006 I actually transferred programs when -- and  
9 I think you might be referring to 1996 or the mid 90s I  
10 became mining team leader. Again, there was a  
11 reorganization effort in the Department in that the early  
12 to mid 90s and one of the upshots of that reorganization  
13 was formation of different teams. And there was a mining  
14 team formed and I was designated as mining team leader.

15 Q. What were the responsibilities of the mining team?

16 A. The mining team was a group of people who worked on  
17 mining issues from different aspects. We had reclamation  
18 people. We had people who worked on mining waste issues.  
19 We had the review engineer, another review  
20 hydrogeologist. We had a staff attorney. And it was  
21 basically the core of people who worked on metallic  
22 mining issues in the Department.

23 And we were charged with work planning, for one, how  
24 we apportion time among the staff to work on mining  
25 issues; we worked on guidance development, policy issues.

1 It was basically, again, a core that worked on mining  
2 issues and I was the leader of the team.

3 Q. How many were people involved in that team?

4 A. I want to say there were -- there were either six or  
5 seven, if I had to make a guess today.

6 Q. Okay. And where was your office located during this  
7 period of time?

8 A. I have been located in Madison the whole time.

9 Q. I would like to digress just a moment and back up  
10 prior to your WDNR employment and ask you about your  
11 educational background.

12 A. I have a bachelor's degree in geology and geophysics  
13 from the University of Wisconsin at Madison and a  
14 master's degree in geology from Northern Illinois  
15 University.

16 Q. And just roughly, when did you get those degrees?

17 A. My bachelor's degree in 1978 and master's degree in  
18 1980.

19 Q. Did your responsibilities at the WDNR bring you in  
20 contact with the Flambeau Mining project?

21 A. Yes, it did.

22 Q. When did that first occur?

23 A. Actually, I think my first site visit to the  
24 Flambeau Mine site was in the early 1980s. It was just  
25 a -- we were looking at potential mining sites at the

1 time and we visited the site in around 1982, '83,  
2 somewhere in there. First formal involvement with the  
3 Flambeau Mining project started when the company  
4 reapplied for a permit in the late 1980s.

5 Q. Okay. And how were you involved in the fact that  
6 Flambeau reapplied for a mining permit at that time?

7 A. At that time I was the main staff person in the  
8 mining program and so I was charged with again reviewing  
9 the mining permit application, the notice of intent to  
10 collect data, the scope of study, the mining permit  
11 application; all geared again at determining possible  
12 compliance with the state's mining laws and rules as they  
13 existed at that time; prepared portions of the  
14 environmental impact statement documents.

15 There was mining rule development going on at the  
16 time that was related to this project and I was charged  
17 with taking the lead on the mining rule development.

18 As it progressed, I became the -- in my role I was  
19 the person who drafted the mining permit. At the time of  
20 the contested case hearing, we had draft permits that we  
21 presented to the hearing examiner. The hearing examiner  
22 actually put out the final permits, but we had draft  
23 permits and I was the staff person responsible for  
24 drafting that permit. Do you want me to continue?

25 Q. I'm going to ask you a question. I'm just going to

1 get a document up. I'm sorry. What was the -- what  
2 position were you in at the time that you began reviewing  
3 this renewed mine permit application?

4 A. At that time I would have been either environmental  
5 specialist or hydrogeologist. That was around the time  
6 that that classification changed.

7 Q. Okay. And at the point in time when the mining  
8 permit was actually granted to Flambeau Mining Company,  
9 what was your position?

10 A. Hydrogeologist.

11 Q. I'm going to show you a document that has been  
12 marked as Exhibit 1000 and ask you if you are familiar  
13 with this document.

14 A. Yes, I am.

15 Q. This is -- you're looking at the first page of about  
16 200 pages I think of documents. Why don't you tell us  
17 what it is.

18 A. Well, this is the cover page of the decision  
19 document as a result of the contested case hearing on the  
20 Flambeau Mining Company application for permits to  
21 operate the mine. It was issued in January of 1991. It  
22 includes all of the permits and approvals that the  
23 Department issued at that time; so there's a mining  
24 permit, an air permit, the various Chapter 30 permits,  
25 solid waste permits, WPDES permit and whatever other



1 permits were issued.

2 Q. Okay. And you mentioned Chapter 30 permits. Just  
3 for the record, what are Chapter 30 permits?

4 A. Chapter 30 permits are those permits issued under  
5 Chapter 30 of Wisconsin Statutes that deal with  
6 construction activities in and around navigable  
7 waterways.

8 Q. Throughout the course of this trial, various people  
9 have referred to the mining permit. Could you tell us  
10 whether or not this is the cover page of the document  
11 that is sort of colloquially referred to as the *mining*  
12 *permit*?

13 A. The mining permit is included in this document. But  
14 the way it's structured is there are general findings  
15 that are part of this document and then there are  
16 separate permits. So there's a separate mining permit, a  
17 separate air permit, a separate WPDES permit, et cetera,  
18 which have -- the general findings are incorporated into  
19 that permit and then there are specific findings and  
20 conditions related to that specific permit.

21 So again, this relates to the mining permit in that  
22 some of the findings of fact and conclusions of law that  
23 are at the beginning of the document apply, but the  
24 mining permit is a stand-alone document.

25 Q. Okay. You don't want to watch the screen here

1 because I'm going to move through it. But actually, you  
2 could look back at it now just to make sure at the bottom  
3 of that first page it's been marked Exhibit JE 1000. Do  
4 you see that?

5 A. Yes.

6 Q. Okay. And then there is an index. Do you see that?

7 A. Yes, I do.

8 Q. And the things that you just mentioned, are those  
9 things that are listed on this index?

10 A. Yes.

11 Q. And are they all basically different permits related  
12 to this one mining project?

13 A. Yes, they are.

14 MR. VAN CAMP: Okay. Move for the admission of  
15 Exhibit 1000.

16 MS. WESTERBERG: No objection.

17 THE COURT: Received.

18 BY MR. VAN CAMP:

19 Q. During the permitting process, what were your  
20 activities?

21 A. Primarily it was review of the application and all  
22 supporting documents, as I've said, to determine  
23 compliance with our laws and rules and insure that that  
24 compliance would continue during the operation. So I  
25 conducted technical reviews of documents that were

1 submitted, conducted site inspections, attended public  
2 meetings and hearings and prepared, as I said, prepared  
3 portions of the draft and final environmental impact  
4 statement and ultimately, as we got towards the end of  
5 the process, drafted the mining permit and my testimony  
6 for the public hearing or the contested case hearing.

7 Q. Okay. Why don't you describe what you mean by the  
8 contested case hearing in this specific instance.

9 A. Under Wisconsin's mining law, the regulatory  
10 process, as you see, there are a number of different  
11 permits that could apply and there's actually more that  
12 could apply for a larger project. But under Wisconsin  
13 mining law, our statutes indicate that there should be  
14 one, it's called a *Master Hearing*, on all DNR-issued  
15 permits and approvals and it's conducted as a contested  
16 case hearing.

17 And by statute, it's to include all -- any permit or  
18 license or approval that's necessary for operation of the  
19 mining project that the Department issues. It's also  
20 intended to cover the adequacy of the environmental  
21 impact statement and compliance with our WEPA law,  
22 Wisconsin Environmental Protection -- or Policy Act law.

23 So it's a contested case hearing on all aspects of  
24 the project. Also, by law, there's to be a noncontested  
25 case portion. So the hearing opens up with public

1 testimony, you know, similar to any informational hearing  
2 that the Department or other agencies conduct.

3       Following that informational portion of the hearing,  
4 and in this case I believe that lasted -- I think we took  
5 33 hours of public testimony or something in that range,  
6 then we started the contested case portion of the hearing  
7 in which each party -- and there were a number of  
8 parties. There was the company, the Department, the  
9 city, the town, the county and a number of environmental  
10 groups. One of the tribes was represented. So each  
11 party can put on witnesses and witnesses are under oath  
12 and subject to cross-examination.

13       Following the contested case portion of the hearing,  
14 there was another informational portion of the hearing.  
15 And that entire record is compiled by the hearing  
16 examiner. And there were court reporters recording  
17 everything and transcriptions were prepared. And then  
18 the hearing examiner has I believe 90 days after the  
19 close of the briefing period following the hearing in  
20 which to issue the decision. And the decision was issued  
21 in January of '91.

22 Q. And did you participate throughout that process?

23 A. I did.

24 Q. And did you participate as parts of both the public  
25 hearing and the private closed hearing?

1 A. We attended most of the public hearing portion. The  
2 hearing was held in Ladysmith and DNR staff tended to  
3 come and go. Myself and a couple other staff were there  
4 probably for 90 percent of it. The same with the  
5 contested case portion of the hearing. Obviously our  
6 attorney was there the entire time and I was there  
7 probably 95 percent of the time.

8 Q. And I think we probably all understand what you mean  
9 by a *contested case hearing*, but what was contested?  
10 What were the issues that were being contested, that you  
11 recall?

12 A. Frankly, it was just about everything, so pretty  
13 much any aspect of the project. I can't think of a  
14 witness that wasn't subject to cross-examination by the  
15 parties. So it's getting to the adequate -- in the case  
16 of the department personnel, it was getting to the  
17 adequacy of our evaluation and getting to the adequacy of  
18 our draft approvals and whether or not the approvals with  
19 the conditions that we proposed would be sufficient for  
20 protecting the environment, you know, whatever the permit  
21 was, whether or not you were protective of the navigable  
22 waterways, the ground water, air, resources, whatever.

23 And certainly the company witnesses, you know, it  
24 was getting down to the voracity of their analyses and  
25 the studies and their technical work, whether or not it

1 was adequate and whether or not it followed accepted  
2 protocol, just the general acceptability of the technical  
3 work that went into this decision document.

4 Q. Okay. Now, drawing your attention back to the  
5 screen beside you, there are a number of permits listed  
6 there. They're -- under No. 3 there's something called a  
7 *Mining Permit*. Who is the issuing authority for that  
8 mining permit?

9 A. Well, again, all of the permits were issued by the  
10 Division of Hearings and Appeals, but that's just the  
11 process. I mean, they're issued under the authority  
12 of -- at that time it was Chapter 144 of the statutes,  
13 which is the Metallic Mining Reclamation Act, it was  
14 called when it was first passed. So they're issued under  
15 the authority of the Department, the DNR.

16 Q. Okay. And would that also be true for the remaining  
17 permits that are listed there? There's a WPDES permit,  
18 water regulatory permit, air pollution permits, so forth.  
19 Are all of those issued by the same authority?

20 A. They all have separate statutory authority, but they  
21 are all issued by the Department of Natural Resources.

22 Q. After the permit was issued permitting the Flambeau  
23 Mining operation just outside of Ladysmith, did you have  
24 any ongoing responsibilities as it relates to the  
25 Flambeau Mining project?

1 A. I was -- I mean, during the permitting phase, we had  
2 a project coordinator and that project coordinator was --  
3 his main charge was coordinating all of the permitting  
4 activities and the development of the EIS. Following  
5 issuance of the permits, I overtook -- I took over the  
6 coordinative function for the Department, so I  
7 coordinated the mining permit, which is viewed as kind of  
8 an umbrella permit because it encompasses the entire site  
9 and, you know, relates to essentially all of the other  
10 permits in one manner or another.

11 And so I was essentially the Department's  
12 coordinator for the Flambeau project. So I coordinated  
13 the monitoring activities of department staff and  
14 surveillance activities and basically was the lead  
15 department person on the mining project starting from  
16 permit issuance and the various activities that were  
17 required under the permits before they could actually  
18 start construction until the time I left in 2006.

19 Q. We never did hear where you went in 2006. Why don't  
20 we put that in the record now.

21 A. I'm still at the DNR. I'm in a different program,  
22 the drinking water and ground water program.

23 Q. Okay. So after the permit was issued, did you have  
24 occasion to interact directly with Flambeau Mining  
25 Company personnel?

1 A. Yes. I conducted frequent site inspections. We had  
2 meetings. They were, under the permits, were required to  
3 submit various reports and monitoring data. That all  
4 came to me primarily. Yes, I had very  
5 frequent interaction.

6 Q. What about direct contact with contractors or  
7 consultants, if you will, that Flambeau Mining Company  
8 employed?

9 A. We had, similarly, very frequent correspondence with  
10 Foth & Van Dyke, who was the main environmental  
11 contractor for Flambeau Mining Company. They prepared  
12 many of the plans that were required as conditions of the  
13 approvals.

14 Q. How many times do you think you visited the Flambeau  
15 Mine site in or near Ladysmith?

16 A. It would be difficult without going over my date  
17 books for that 15-year period or whatever it was, but I  
18 would estimate well over a hundred.

19 Q. Okay. And what were your typical activities when  
20 you visited the Flambeau Mine site?

21 A. Sometimes it would be just for going to a specific  
22 meeting. But typically when we went on a site  
23 inspection, it would include walking or driving the  
24 entire site; or if there was a particular area of  
25 construction or some activity going on, we would focus on



1 that. But generally, when we made the trip up there, we  
2 would inspect the entire site.

3 Q. Okay. You mentioned the statutes under which the  
4 mining permit was issued. How many mines have been  
5 permitted under Wisconsin's modern mining statutes?

6 MS. WESTERBERG: Object to form of the question,  
7 *modern mining statutes*.

8 THE COURT: Give us a clue.

9 BY MR. VAN CAMP:

10 Q. Have you heard that term before?

11 A. Yes.

12 Q. What does that term mean to you?

13 A. They're not all that modern anymore. The mining law  
14 was, basically the current iteration of the mining law,  
15 was passed in 1978. Since 1978, and as a condition of  
16 that first law, we had to issue permits for some existing  
17 mines at the time. So we have issued permits for mines  
18 that were in existence when the mining law was passed.  
19 Flambeau Mine is the only new mine that was permitted  
20 under the current mining laws.

21 THE COURT: Since 1978?

22 THE WITNESS: Yes.

23 MR. VAN CAMP: I've got a light that is blowing  
24 us away at this time. Do you mind if I put that down?

25 THE WITNESS: That's supposed to be shining on

1 me.

2 MR. VAN CAMP: Thanks. Sorry. So I missed your  
3 answer. Really, I'm seeing dots right now.

4 THE COURT: I have the same problem for a  
5 minute, so I can sympathize.

6 MR. VAN CAMP: If I move around trying to find  
7 you among my dots, bear with me.

8 BY MR. VAN CAMP:

9 Q. Did you -- are you aware of any other mines that  
10 have been permitted, metallic mines that have been  
11 permitted, under that statute in the state of Wisconsin?

12 A. As I said, and you weren't paying attention.

13 Q. I'm sorry. I was trying.

14 A. -- we did issue permits to mines that were existing  
15 at the time that had to get permits. But the Flambeau  
16 Mining Company mine is the only mine that -- new mine  
17 that was permitted that wasn't in existence when the law  
18 was passed, so it's the only one that's started up since  
19 the law was passed.

20 Q. Okay. Did your activities on behalf of DNR include  
21 the period of time when Flambeau Mining Company was  
22 actively engaged in mining?

23 A. Yes.

24 Q. And what typical activities did you have during that  
25 mining phase?

1 A. Again, it was reviewing monitoring data as it came  
2 in, reviewing annual reports. They were required to  
3 submit two separate annual reports, one a general annual  
4 report which reported or recounted all of the monitoring  
5 results for the year, discussed trends that were seen in  
6 any of the monitoring data. It included discussion of  
7 any minor deviations that may have come up.

8 Under the permit, they were allowed to have some  
9 minor flexibility in how they ran the project and so they  
10 had to account for all of those in annual reports. They  
11 had to document any issues that they had with liners in  
12 the various facilities. So they had that annual report  
13 and then there's also a separate annual reclamation  
14 report which documented the various reclamation  
15 activities that took place during the life of the mine.

16 In addition to that, I was responsible for, you  
17 know, any correspondence that came in regarding the mine.  
18 Inquiries from the public, legislators, whoever had an  
19 interest, generally came to me and I would respond to  
20 those; conducting my own site inspections, as I said, and  
21 coordinating other staff who conducted frequent site  
22 inspections as well.

23 Q. Okay. In talking about this other staff that were  
24 involved in the Flambeau Mining Company, why don't you  
25 tell us a little bit about the different WDNR employees,

1 other than yourself, that were involved in that project.

2 A. Well, again, for each of these permits that were  
3 issued, there was a staff person assigned and they had  
4 their own requirements for monitoring and determining  
5 permit compliance. So they would go out, not all that  
6 often, maybe a couple times a year.

7 But from the mining permit program or the mining  
8 program, we had three people who made frequent site  
9 inspections. Besides myself, we had our reclamation  
10 expert who would go on a number of site visits. More  
11 importantly, we had a staff person stationed in  
12 Rhinelander, Wisconsin and he would go to the site  
13 routinely a couple of times a week, particularly during  
14 the operating phase of the project. He would go on  
15 weekends. He'd go at night occasionally, you know,  
16 surprise inspections, announced inspections. He made  
17 very frequent site visits.

18 Q. Okay.

19 A. Again, he was also the staff person who generally,  
20 you know, oversaw the monitoring activities. So when  
21 they were collecting ground water samples, he would be in  
22 the field with them watching their procedures and he  
23 would actually split samples with the company to verify  
24 the monitoring data.

25 Q. Okay. And just so the record is complete, what are

1 split samples?

2 A. Split samples are when you collect a sample and  
3 basically the company gets half of the water and we get  
4 half of the water and we send it to different labs and  
5 compare the results.

6 Q. Okay. And over what period of time did this occur?

7 A. He did that from the time construction began; so,  
8 you know, 1991 into 1992; through the time he retired  
9 in -- I think he retired in 2006, shortly after I left  
10 the program.

11 Q. And when you say you sent samples to different labs,  
12 what do you mean by that?

13 A. We would send our labs to the Wisconsin State Lab of  
14 Hygiene and the company had their samples analyzed by  
15 another lab. And I can't recall which one it was  
16 offhand. I don't know. Go ahead.

17 Q. I'm sorry.

18 A. No, I'm just not sure which lab it was. I don't  
19 know if Foth & Van Dyke did the analyses or they sent it  
20 to another lab.

21 Q. Northern Lakes?

22 A. Could be.

23 Q. Then after the samples that were kept by Flambeau  
24 Mining Company were sent to the labs, did DNR get copies  
25 of those sample results as well?

1 A. Yes. They would come in quarterly.

2 Q. Do you recall approximately when the -- well, let  
3 me -- while mining was going on, you said you also had a  
4 reclamation expert from the Department going up to make  
5 visits. What types of reclamation were going on during  
6 the time that the active mining was taking place?

7 MS. WESTERBERG: Your Honor, we just want to  
8 object to relevance on the line of questioning during  
9 active mining. I don't know that that's really the  
10 period of time in dispute here.

11 MR. VAN CAMP: Well, actually, the reclamation  
12 activities that began back then are very relevant to, you  
13 know, the whole reclamation.

14 THE COURT: I think they are relevant. Why  
15 don't you just get some specific dates, if you can.

16 MR. VAN CAMP: Okay.

17 BY MR. VAN CAMP:

18 Q. Do you know when the reclamation activities, not for  
19 the overall reclamation, but when any reclamation  
20 activities began at the Flambeau Mine site?

21 A. Well, really, reclamation begins with construction.

22 Q. And why was that?

23 A. Well, part of reclamation is managing the site  
24 during construction to minimize runoff and erosion. So  
25 during the construction phase, for example, the company

1 salvaged wetland soils. There were little pockets on the  
2 site of hydric soil, so they would -- and this was all  
3 part of the reclamation plan -- so they would excavate  
4 that hydric soil and move it to what's called the *hydric*  
5 *soil stockpile*.

6 And then there were other things that went into  
7 stabilizing that stockpile. They had to scrape the top  
8 soil off and put that in a separate topsoil stockpile.  
9 And then once the pile was in place, then there was  
10 revegetation. The entire pile was revegetated to  
11 stabilize the soil.

12 When the waste rock was being generated, the  
13 external berms of the waste rock, if they weren't going  
14 to be disturbed anymore, had to be stabilized and  
15 revegetated. Somebody mentioned earlier today the test  
16 plots. That was a big part of reclamation in that when  
17 the reclamation plan was developed, you have an idea of  
18 what you intend to plant on the site when you're done.

19 But the idea of the test plots is to test whether or  
20 not that, those seed mixes, would actually work on the  
21 materials that you have. So they had test plots with  
22 different types of treatments, different fertilizers,  
23 different soil amendments, different seed mixes, they  
24 would have them facing different slopes; again, all  
25 intending to reduce the uncertainty when you come to

1 final reclamation so that you have some idea, okay, this  
2 seed mix will work with this particular soil amendment  
3 and this fertilizer best on slopes or on flat areas, so  
4 that was all part of reclamation. They salvaged trees  
5 when they were constructing the site. They dug them out  
6 and they had a separate nursery on the site.

7       So, I mean, as I said, reclamation really begins  
8 with construction. And actually, the first thing they  
9 had to do on the site was construct certain soil erosion  
10 or put certain soil erosion mechanisms in place, so straw  
11 bales, silk fence, before they actually started  
12 disturbing the site.

13           THE COURT: All right. I think this is a good  
14 time for a recess. We will take 15 minutes.

15       (Recess at 3:15 until 3:30 p.m.)

16           THE COURT: Mr. Van Camp.

17           MR. VAN CAMP: Thank you, very much, Your Honor.

18 BY MR. VAN CAMP:

19 Q. Just before the break, we were talking about the  
20 salvaging of trees and so forth in the reclamation part  
21 of this project and how it began. We have I think sort  
22 of gone through the time period up to and including some  
23 of the active mining.

24       What I would like to do before I take down the  
25 document that is on the screen next to you, which was the



1 list of permits and things, I would like to take you to  
2 the WPDES permit, which I believe is on, what was it,  
3 page 132, 132nd page of that document. Could you tell us  
4 what this is?

5 A. That's a WPDES permit issued by the Department of  
6 Natural Resources.

7 Q. Okay. And were you familiar with that as part of  
8 the permitting process in this case?

9 A. I was. I wasn't responsible for drafting this  
10 permit, but I was familiar with it.

11 MR. VAN CAMP: Okay. And that's -- what's that  
12 a part of, Exhibit --

13 MR. GEORGE: 1000.

14 MR. VAN CAMP: -- 1000? Okay.

15 BY MR. VAN CAMP:

16 Q. There came a time when the mining was beginning to  
17 wind down and the reclamation efforts were winding up.  
18 Do you recall about what that time period was?

19 A. Yes. In the range of 1996 to 1998, the mining  
20 activity was slowly diminishing. They reached a point  
21 where they were no longer mining, but they continued  
22 shipping ore. And then once the ore was completely  
23 shipped off site, they went into full-scale reclamation.

24 Q. Let's just talk briefly about shipping ore off the  
25 site. What was done with the ore once it was taken out

1 of the ground?

2 A. It was transported by truck to an ore stockpile on  
3 the west end of what we'll call now the *industrial outlot*  
4 area. Then it went -- it was run through a crusher and  
5 loaded onto railcars. And the railcars would sit on the  
6 rail spur on the east end of the site until they were  
7 shipped by the rail spur out to the main line.

8 Q. Okay. Where was that ore processed, do you know?

9 A. It went to a couple of different places, depending  
10 on the grade of the ore, but both sites were in Canada.

11 Q. So as the mining operation started to wind down and  
12 the reclamation activities began, what was your role  
13 during that period of time?

14 A. Well, again, it was similar to the earlier parts of  
15 the project in that I was responsible for coordinating  
16 any department activity related to reclamation. I wasn't  
17 the reclamation expert, but in my role as a project  
18 coordinator, I needed to understand what they were doing,  
19 any issues that may have come up, and in this case  
20 process the reclamation plan modification.

21 Q. Do you recall who the reclamation expert was during  
22 that period of time?

23 A. I do.

24 Q. Who was that?

25 A. Tom Portal.

1 Q. Okay. Now, the pit was filled at some point,  
2 correct?

3 A. Yes.

4 Q. Do you recall approximately when that occurred?

5 A. I think pit-filling was completed in 1997.

6 Q. And what was involved in the reclamation activities  
7 after that?

8 A. Well, pit-filling was actually part of reclamation.  
9 I mean, it was covered under the reclamation plan. So  
10 the next phase would have been -- again, it's kind of  
11 hard to separate things.

12 Q. Okay. Why don't we start with the pit-filling.

13 A. The pit-filling was very prescribed. Certain  
14 materials had to go in the bottom of the pit and then  
15 sequentially went up with different materials. Once all  
16 the waste rock was in the pit, then they applied glacial  
17 till, which was just glacial overburden, graded the site  
18 to a rough grade and then eventually put topsoil on it  
19 and then the revegetation process.

20 Throughout that process there was also creation of  
21 the drainage features, so part of the grading process is  
22 establishing the permanent drainage on the site. And  
23 again, that was all part of final reclamation. The final  
24 step is revegetation.

25 Q. What types of contouring are we talking about for

1 the water drainage, and so forth, on the site?

2 A. Well, on the main part of the site, again as part of  
3 the modified reclamation plan, there's a wetland area  
4 that was reconstructed. And so the water enters the  
5 site, and again, this is the main part of the mining  
6 site, not the outlot. But water comes in from the east  
7 side of Highway 27, runs into this constructed wetland.  
8 And then it's channelized on the site, flows down and  
9 kind of meanders around the site into another wetland  
10 area -- another biofilter, if you will -- and that's one  
11 portion of the site.

12 It's broken down into separate watersheds and so  
13 each watershed has different drainage features. For the  
14 most part, it's grassy swales that direct the water, the  
15 surface water, around the surface site. It bends on the  
16 swales through the drainageways there's riprock to  
17 protect the soil so that you don't get excessive erosion  
18 on the outside of the meanders.

19 But it's basically configuring the surface so that  
20 water runs into these drainageways and ultimately to a  
21 large biofilter on the main part of the site and then  
22 from there flows on to the Flambeau River.

23 Q. You've spoken about the modification of the original  
24 reclamation. Were you involved in that at all?

25 A. Yes.

1 Q. What was your involvement in that?

2 A. Again, it was to review the plan and coordinate the  
3 Department response.

4 Q. Okay. And what did you understand the reason for  
5 the modification request to be?

6 A. Well, again in regard to the biofilter. I mean,  
7 there were a couple of different parts of the  
8 modification, but the biofilter or the industrial outlot  
9 portion was to maintain -- retain buildings for use by  
10 the community.

11 We were told that the Ladysmith Industrial  
12 Development Corporation had interest in trying to attract  
13 clients to use the buildings and other facilities on the  
14 site and we were asked whether or not we would agree to  
15 that. And ultimately we did and we put a four-year time  
16 limit on it in which they needed to have definitive uses.  
17 If they didn't have a use defined for any portion of that  
18 outlet, then they had to reclaim the site consistent with  
19 reclamation of the remainder of the site.

20 In addition to the outlet, the modification also  
21 included some other aspects of reclamation on the main  
22 part of the mine site. One was moving that main wetland  
23 that I mentioned earlier from kind of the -- I don't  
24 know, what direction would that be -- the northwest  
25 corner of the mine site up to the northeast corner of the

1 mine site. Some of the internal drainage on the site was  
2 also affected by the modification.

3 Q. Okay. To the extent that the modification request  
4 involved local community interest to use some of the  
5 buildings that had been constructed by Flambeau Mining  
6 Company, did the Department have a position on that?

7 A. Well, the mining law allows for that. The ultimate  
8 goal of reclamation is to return the site to close to or  
9 to the similar premining condition or close to it or if  
10 that's physically or economically or socially  
11 undesirable, to something else. There's also provision  
12 in the law that allows for retention of facilities if  
13 they're to be used for another beneficial use.

14 So under the mining law, that was acceptable to  
15 consider that type of a change. And so when we got the  
16 request from the company, we also -- they also submitted  
17 information from the Ladysmith Industrial Development  
18 Corporation in which they expressed that interest saying  
19 that these facilities are only six years old and they  
20 think they could put them to another use. And so we  
21 entertained that thought and we allowed it and put a  
22 four-year time limit on it.

23 Q. Do you know what one of the buildings is used for on  
24 that outlet?

25 A. I do now, yeah. I mean, that actually came up

1 during the whole process of the modification, I learned  
2 that we were considering leasing that property from the  
3 Ladysmith Industrial Development Corporation.

4 THE COURT: You didn't mean to say that the  
5 buildings could only be used for four more years.

6 THE WITNESS: No, that they had to have use  
7 within -- they didn't have specific uses. They didn't  
8 have anything specified. So, for instance, the area  
9 where the equestrian area is now, that got right up to  
10 the four-year point. We were about at the time saying,  
11 okay, you haven't designated a use for that, so you have  
12 to reclaim it consistent with the rest of the site.

13 The other -- I mean, the building sites, they did  
14 identify clients much sooner than that, so they were able  
15 to keep the buildings.

16 BY MR. VAN CAMP:

17 Q. Were you aware of, when the modification or the  
18 application for the modification was first submitted,  
19 what was going to happen with the water treatment  
20 facility?

21 A. When the modification request came in in either late  
22 1997 or January of '98, there was -- the water treatment  
23 facility was going to remain in place.

24 Q. And with it remaining in place, was there an  
25 understanding at that time of what was going to happen

1 with storm water runoff?

2 A. The plan for storm water runoff, again, are you  
3 talking just in the industrial outlot area?

4 Q. I'm sorry. Yes.

5 A. In the industrial outlot area, storm water would be  
6 collected through a manipulation of the topography so it  
7 all drained to the former surge pond which became the .9  
8 acre biofilter. The biofilter is constructed in a way  
9 that flow would come in on the northwest end and have  
10 kind of a sinuous path through it to encourage settling  
11 of sediment and then it would exit on the northeast  
12 corner.

13 Q. Okay. And do you know, during this period of time,  
14 what decision was made regarding the decommissioning or  
15 plugging up or tearing apart, or whatever you want to  
16 call it, the water treatment plant?

17 A. Yes.

18 Q. What was that about?

19 A. Well, when the -- when we received the modification  
20 request, we completed our review and we were prepared to  
21 issue or approve the modification. As part of our  
22 process we found that the requested -- again, by law --  
23 we found that the requested modifications were  
24 substantial, which meant that we had to public notice the  
25 modification.



1           And so we issued a public notice disclosing that the  
2 company wanted to retain these facilities, the Department  
3 was intending to approve it. If anybody objected or  
4 wanted to request a hearing, they could. By law, if we  
5 receive five requests or requests from five individuals,  
6 we have to hold a contested case hearing.

7           We received 12 petitions for a hearing shortly after  
8 the public notice was issued. And it was clear, in  
9 discussions with the petitioners, that -- I mean, by law,  
10 it would be a contested case hearing process, which means  
11 everybody is represented by attorneys. Not that there's  
12 anything wrong with attorneys.

13           THE COURT: But they're expensive.

14           THE WITNESS: But they're expensive.

15 A. It's was a very involved process. What people  
16 really wanted, after discussion with some of them, was an  
17 opportunity to have more or less of an informational  
18 meeting to discuss the issues and try to understand  
19 things and perhaps address some of their concerns, so we  
20 agreed to have a meeting.

21           It wasn't a public notice informational hearing or  
22 meeting; it was an open meeting with the petitioners. I  
23 presided over the meeting. The Flambeau Company or  
24 Flambeau Mining Company personnel was there. There was  
25 people from Foth & Van Dyke, you know. The legislator

1 from the area was there. I believe the mayor was there;  
2 people from the city, the town, the county. But the main  
3 participants were the Department, Flambeau Mining Company  
4 and the petitioners.

5 The petitioners outlined what their main issues were  
6 and one of their main issues was retaining -- the  
7 retention of the wastewater treatment plant as an  
8 operational facility.

9 THE COURT: They were opposed to it?

10 THE WITNESS: They did not want the treatment  
11 plant to be used again, as it was conveyed to me at the  
12 meeting. The concern was, they didn't want another user  
13 or industry coming in who would continue to have a  
14 discharge to the Flambeau River and that was the concern.  
15 They didn't want there to be a continued industrial  
16 wastewater discharged to the Flambeau River, and so they  
17 objected to retaining the workings of the wastewater  
18 treatment plant.

19 And as a result of that meeting and the discussions  
20 we had, the company agreed to basically gut the treatment  
21 plant and just leave the building so that at least the  
22 building could be used for storage and maintenance and  
23 other activities, but it wouldn't be a wastewater  
24 treatment plant.

25 Q. Just staying with the wastewater treatment plant for

1 a moment, what was the DNR's role in the monitoring of  
2 the operation of the wastewater treatment plant up to the  
3 point that it was decommissioned?

4 MS. WESTERBERG: Object to relevance.

5 THE COURT: Overruled.

6 A. Well, again, it was regulated in a manner similar to  
7 the way that we regulate all industrial facilities, and  
8 that is, we generally rely on self-monitoring. So the  
9 company was responsible for monitoring operation of the  
10 treatment plant, conducting the various chemical analyses  
11 and reporting those results to the Department according  
12 to a schedule in the wastewater -- or in the WPDES permit  
13 that was issued.

14 In addition to that, we had staff from our northern  
15 region who would conduct audits or inspections of the  
16 facility and he would also collect split samples in a  
17 manner similar that I discussed on the ground water  
18 sampling. He would collect samples of the effluent.  
19 Basically, they had a sampling port where we could go and  
20 fill up his sample bottles, and then he would have them  
21 analyzed by the state lab again to verify the analytical  
22 results that the company was producing.

23 Q. Throughout the operation of the Flambeau Mining  
24 facility up to the point in time where that water  
25 treatment facility was decommissioned, are you aware of

1 any violations of the permit limitations?

2 A. There weren't any violations of numerical effluent  
3 limits. There were a couple of instances where they  
4 failed, what's called, *bioassay tests*. And they were --  
5 so what that then triggered was additional testing and  
6 the company had to try to figure out why the bioassay  
7 test failures occurred. And that led to the company  
8 actually coming up with some fairly unique and inventive  
9 ways of dealing with that.

10 And basically the ultimate decision was the water  
11 was essentially too clean, that there wasn't anything for  
12 the organisms to live on. So they ended up adding citric  
13 acid I believe to it to kind of chelate things. I'm not  
14 a chemist. So anyway, after they had those couple of  
15 failures, they adjusted their treatment process and they  
16 didn't have any other issues.

17 Q. Okay. When those issues came up, was enforcement  
18 action required to come to a solution?

19 A. No.

20 Q. Okay. Let's go back now to the meeting that you  
21 chaired. What other things do you recall being issues in  
22 the discussions at that time regarding the modifications  
23 that were being requested?

24 A. The most significant issues again were the water  
25 treatment facility. There was concern over the way in

1 which the site would be maintained. The ecological  
2 consultant that Flambeau hired was proposing to  
3 incorporate mowing as a prairie maintenance technique.  
4 And the people who were opposed to the modification  
5 wanted to insure that there would be prescribed burning  
6 on the site to maintain prairie vegetation.

7       There was opposition, as Mr. Fox testified, to  
8 retention of the fence, retention of the electrical  
9 supply facilities on the end of the pit. There was some  
10 discussion about certain species in the seed mixes, if I  
11 recall. But again, the biggest concerns were the fence,  
12 the mowing versus burning, and the water treatment  
13 facility.

14 Q.    Okay. And you presided over those meetings. What  
15 was the outcome?

16 A.    Well, the outcome was what happened. I mean, I left  
17 the meeting and I told -- there was one individual who  
18 was kind of coordinating on behalf of the petitioner, so  
19 I dealt primarily with him.

20 Q.    Who was that individual?

21 A.    His name was Tom Wilson. He was with an  
22 environmental group from Northern Wisconsin. But the way  
23 it was left was, I mean, the company, you know, left the  
24 meeting and there were certain things that the  
25 petitioners wanted and the company knew that and they

1 essentially agreed to it.

2 And so there was some correspondence between me and  
3 Mr. Wilson in which I laid out what the agreement would  
4 be, how we would deal with it in the modification  
5 approval, and indicated to him that if we had enough of  
6 the petitioners withdraw their requests for a contested  
7 case that we wouldn't have to go to a contested case  
8 hearing.

9 So ultimately I guess I crafted conditions of  
10 approval for the modification and shared them in essence  
11 with the petitioners. And they agreed that they  
12 addressed their concerns and enough of the petitioners  
13 withdrew their requests for a hearing, so we issued the  
14 approval.

15 Q. Do you recall what modifications had to be made to  
16 the, shall we say, the *approval* that was ultimately  
17 granted from the one that was initially requested?

18 A. I don't remember all of them. But again, we dealt  
19 with the retention of the wastewater treatment facility  
20 in dismantling it. That was a condition of the approval  
21 of the modification. The fence removal, the electrical  
22 supply removal, insuring that prescribed burning would be  
23 the method of prairie maintenance; those were the main  
24 ones.

25 Q. Then did the modification go forward and the

1 industrial outlot was retained?

2 A. Yes.

3 Q. With the industrial outlot, without the wastewater  
4 treatment facility, came a concern about -- there came a  
5 concern about how to deal with storm water, correct, in  
6 that modification discussion? If they couldn't use the  
7 wastewater treatment plant, how were they going to do it?

8 A. That wasn't part of the discussion.

9 Q. Okay.

10 A. So, no, there wasn't any discussion of treating  
11 storm water.

12 Q. Okay. At what point in time then, from your  
13 perspective, was a decision made to utilize a biofilter  
14 for storm water treatment?

15 A. Well, that was part of their modification request in  
16 early 1998, but there wasn't any treatment beyond, you  
17 know, kind of a passive treatment in the biofilter.

18 Q. Okay. And at the time the modification was  
19 requested, was there a design for the biofilter?

20 A. Yes.

21 Q. And did that design at the time of the modification  
22 include an overflow?

23 A. Yes.

24 Q. As the treatment of water from the mine site wound  
25 down through the water treatment facility, the WPDES

1 permit was also winding down, correct?

2 A. Yes.

3 Q. Could you tell the Court about that process?

4 A. When the site was being reclaimed and after the main  
5 pit-filling had occurred and the site had been topsoiled  
6 and final graded, we had a discussion with the company.  
7 So it was mining staff with the company, along with our  
8 storm water staff or wastewater staff at the time,  
9 talking about what would happen to storm water on the  
10 site relative to the existing WPDES permit.

11 It was decided that we would regulate storm water on  
12 the site through the mining permit. And we had  
13 correspondence with the company indicating that at the  
14 time they were pumping water around the site from one  
15 spot to another because certain parts of the site weren't  
16 yet stabilized and they didn't have all of their final  
17 erosion control and drainage features in place. But once  
18 they started pumping water from one site to another, what  
19 we indicated was storm water management would fall under  
20 the mining permit rather than WPDES permit.

21 Q. Who was involved in that decision?

22 A. It was myself and our wastewater staff at the time.

23 Q. Okay. And why was that decision made?

24 A. We -- the storm water program -- and again, this was  
25 in early 1998 -- was relatively new at the time and



1 storm water staff were basically swamped with permit  
2 applications, so that was one factor.

3       The other factor was, we looked at it in that there  
4 was a provision in our storm water code that basically  
5 gave us the authority to regulate storm water using a  
6 different regulatory mechanism than a formal storm water  
7 approval as long as, you know, we had similar protection.  
8 So it was our feeling that it was -- we had basically a  
9 functional equivalence from the mining permit to the  
10 storm water permit at the time; that we could have equal  
11 protection, if not greater protection, under the mining  
12 permit.

13       And ultimately the storm water management on the  
14 site was going to come down to best management practices,  
15 so making sure that site -- that slopes were stable, that  
16 any erosion control features were in place and well  
17 maintained, that you weren't getting scouring or erosion  
18 of drainage features. In order to do that, you needed to  
19 have a presence on the site.

20       As I said, we had a mining person staff in  
21 Rhinelanders who would visit the site a couple times a  
22 week, I was on site, our reclamation person was on site.  
23 So we simply felt we were better positioned to keep an  
24 eye on the site and insure compliance, you know, with  
25 what was required than our storm water people who might

1 be there once or twice a year.

2 Q. I believe you indicated that storm water people were  
3 involved in that decision?

4 A. Yes.

5 Q. What were the other alternatives that you saw at  
6 that time to regulating it under the mining permit?

7 MS. WESTERBERG: Object to leading.

8 THE COURT: Overruled.

9 A. I believe the other alternative was to require the  
10 company to get a specific storm water permit for the  
11 site.

12 Q. Another PDES permit?

13 A. Yes.

14 Q. What sort of staffing did the storm water people  
15 have at that time to monitor the Flambeau Mine site?

16 A. I'm not sure, but my understanding was, it was part  
17 of -- they had regional staff who would inspect  
18 industrial facilities and they rolled storm water into  
19 that I believe in the early parts of it. I think now  
20 they have different staffing, but at the time I think it  
21 was just part of the regional wastewater staff.

22 Q. You referred to that "We had regulatory authority  
23 under the mining permit to deal with storm water."

24 A. Mm-mm.

25 Q. What was that that you're referring to?

1 A. Well, as part of the mining permit, the company  
2 already was required to develop a surface water  
3 management plan so that the surface water management plan  
4 was part of the permit that you had up earlier and that  
5 dealt with how they're going to manage surface water on  
6 the site. That was in place from prior to construction  
7 and continued through operation and into reclamation, so  
8 we had that mechanism already in place. Again, our staff  
9 was familiar with what was required on the site and how  
10 you maintain it and what was important and what wasn't.

11 Under the mining law, there are also specific  
12 provisions in the mining law talking about management of  
13 water on the mining site, ground water and surface water,  
14 so we had authority under the mining law to deal with  
15 surface water.

16 Q. Okay. Were you familiar with any provisions under  
17 the storm water code that gave the mining permit people  
18 authority to do that?

19 A. Yes.

20 Q. And what was that?

21 A. Well, again, the actual provision was somewhere in  
22 NR 216. I think it might have been 216.21, but I'm not  
23 sure. Generally, it provides that in lieu of a specific  
24 storm water permit, the Department can regulate storm  
25 water on a site under another regulatory authority

1 provided the requirements are similar or as stringent. I  
2 don't recall the language, but that was the general crux  
3 of it, and that's why we did what we did.

4 Q. Okay. After the storm water -- well, let's speak in  
5 terms of after the WPDES permit was terminated. At that  
6 point in time what discharge was there from the mine site  
7 that was being regulated under the mine permit?

8 A. Really there were two: one, it was the discharge out  
9 of both biofilters, the biofilter on the main part of the  
10 mining site which collects drainage from the former pit  
11 area and one of the waste rock areas and topsoil area;  
12 and then the biofilter on the industrial outlot.

13 Q. And what monitoring occurred after the WPDES permit  
14 was terminated of the storm water discharges from the  
15 biofilter?

16 A. Initially there was none. But once the biofilters  
17 were created, the company did monitor water quality in  
18 the various wetlands that were created on the site, so  
19 they monitored both biofilters and the other wetland just  
20 for quality.

21 Q. At that time when the Flambeau Mining Company was  
22 monitoring them, were there any requirements by the DNR  
23 to do that?

24 A. It was part of the monitoring plan.

25 Q. And what was that monitoring plan being -- what was

1 that controlled by, if you would?

2 A. The monitoring plan was part of the -- the mining  
3 permit, which we talked about, was made up of the mining  
4 plan approval, the reclamation plan approval,  
5 monitoring -- and the monitoring plan approval.

6 Q. Okay.

7 A. They were separate plans that were all approved  
8 within the mining permit.

9 THE COURT: So was it your view that when you  
10 did this monitoring after the biofilter was built that  
11 you were still carrying out the terms of the original  
12 permit? Maybe that wasn't --

13 THE WITNESS: Well, the biofilter was a result  
14 of a modified -- the modification to the reclamation  
15 plan.

16 THE COURT: Right. So in your view, you were  
17 still doing what you had committed to do on the part of  
18 the DNR?

19 THE WITNESS: Yes.

20 THE COURT: So when you said to your boss, I  
21 need to pay for these people to go out and monitor, that  
22 was okay because it was part of this whole plan, even  
23 though there was no permit in effect at that time?

24 THE WITNESS: No. The permit continues in  
25 effect.

1 THE COURT: Oh, it does.

2 THE WITNESS: Yeah.

3 THE COURT: Then I misunderstood something.

4 THE WITNESS: The mining permit continues in  
5 effect until basically the certificate of completion  
6 process. And then even after that, we still have  
7 monitoring and various reporting requirements.

8 THE COURT: Thank you.

9 BY MR. VAN CAMP:

10 Q. And under the mining permit, how long will that go  
11 on?

12 A. I'm not exactly -- I wasn't part of the program when  
13 they issued the certificate of completion, so I don't  
14 know the details of what is required currently.

15 Q. And is that where in the certificate of completion  
16 the continuing activities would be found?

17 A. Again, frankly, I haven't even looked at their  
18 certificate of completion. Again, by law, there is --  
19 the company has to maintain a portion of their bond for  
20 an additional 10 to 20 years depending on what type of a  
21 mine it is.

22 Q. Okay. At the time the decision was made to regulate  
23 the storm water runoff from the industrial outlot under  
24 the mining permit, did you believe that that was a good  
25 decision for the DNR to make?

1 MS. WESTERBERG: Object to relevance.

2 THE COURT: Overruled.

3 A. Yes, I believed it was the right approach to take,  
4 again, for the reasons I laid out earlier: primarily we  
5 were the staff that were on the site the most often; we  
6 were in the best position to monitor the condition of the  
7 site.

8 Q. From the standpoint of protecting the public; the  
9 Wisconsin population, if you will; could you tell us  
10 whether or not you believe that this was the best thing  
11 to do to monitor discharges from that, I mean, from the  
12 biofilter?

13 MS. WESTERBERG: Same objection. Irrelevance  
14 and speculation.

15 THE COURT: Overruled.

16 A. Again, yes. Technically, could the storm water --  
17 had we required a storm water permit, could they have  
18 gotten the same thing as far as design and, you know,  
19 kind of the nuts and bolts of surface water management  
20 and storm water management? Yes.

21 But I'll go back to what we saw as most important  
22 was, you can have a great plan and you can construct the  
23 things to implement that plan, but we've always stressed  
24 surveillance and monitoring to insure that the plans are  
25 being met. And that was the biggest factor in our

1 decision was, we had the staff and time to keep an eye on  
2 the site and make sure that the various elements of the  
3 plan were being maintained and that it was functioning  
4 the way it was intended.

5 Q. Did you do that?

6 A. Yes.

7 Q. Now, after that modification of the regulation from  
8 the WPDES permit to the mining permit for the storm water  
9 runoff, how much longer did you remain involved in  
10 activities with Flambeau Mine site?

11 A. Well, modification was issued in 1998 and I left the  
12 program in 2006.

13 Q. Okay. Between those two times there were some  
14 concerns raised at different times about some of the  
15 storm water, correct?

16 A. Yes.

17 Q. Could you tell the Court about what concerns were  
18 raised and what was done about that?

19 MS. WESTERBERG: Object to leading.

20 THE COURT: Was there an objection?

21 THE WITNESS: Yes.

22 MS. WESTERBERG: I will withdraw it.

23 THE COURT: Okay.

24 MR. VAN CAMP: Go ahead.

25 A. Again, it really started when the company started



1 sampling water quality in the wetlands. And some of the  
2 first -- the first samples that we received, and I don't  
3 remember the year, it was either 1999 or 2000, showed  
4 elevated copper in the biofilter. Along with that, in  
5 the course of conducting our inspections, primarily our  
6 northern region staff noted, what he called, *mineral*  
7 *blooms* on the rail spur. So if you get copper and other  
8 minerals on the surface and you get certain chemistry  
9 going on, you can get minerals precipitating on the  
10 surface and you can tell that they're not supposed to be  
11 there, basically.

12 So he noted the presence of mineral blooms and we  
13 said, well, you know, this is -- it looks like it could  
14 be a problem, so the company continued monitoring,  
15 stepped up the frequency of monitoring. We continued to  
16 notice increased precipitation of secondary minerals on  
17 the surface.

18 THE COURT: And this was the surface of --

19 THE WITNESS: The rail spur on the mine site.

20 THE COURT: I'm sorry?

21 THE WITNESS: The rail spur on the mine site.

22 THE COURT: So it was on --

23 THE WITNESS: On the surface, on the rocks.

24 THE COURT: -- ground water, essentially?

25 THE WITNESS: No. It was on the -- it was on

1 the gravel.

2 THE COURT: Oh, it wasn't on water?

3 THE WITNESS: No.

4 THE COURT: Oh.

5 THE WITNESS: No. It was on the rock.

6 A. So eventually, you know, based on our observations  
7 of mineralization in the ballast and on the rail spur and  
8 water quality results in the biofilter, it led to the  
9 soil sampling and the ultimate excavation of the rail  
10 spur. That was the initial activity in 2003-2004.

11 Sampling continued. And as was testified earlier  
12 today I think by Jim Hutchison, we kept stepping further  
13 upstream, if you will, to identify additional source  
14 areas. And as those source areas were identified, the  
15 company proposed methods to mitigate or remediate those  
16 source areas.

17 Q. Okay. And again, did the remediations that ensued  
18 come about because of enforcement action?

19 A. No.

20 Q. How did they come about?

21 A. It came about really, we had a fairly collaborative  
22 approach with the company. If we saw an issue in the  
23 field, you know, whether it was straw bales, you know,  
24 deteriorating or disintegrating needing to be replaced or  
25 bare spots in vegetation, we would bring it to their

1 attention and they would fix it. So it was part of that  
2 whole process, in the course of us doing inspections in  
3 surveillance work, identifying an issue, bringing it to  
4 their attention and they would respond.

5 Q. Over the period of time that you worked with  
6 Flambeau Mining Company, how did you find them in terms  
7 of openness and willingness to work with the Wisconsin  
8 DNR?

9 A. Generally, they were very open and, you know,  
10 responsive. Again, as we found issues, they would  
11 generally take care of them.

12 Q. Are you aware of any instances where that wasn't the  
13 case?

14 A. We had some personality issues at times with their  
15 staff.

16 Q. Without mentioning personalities, just --

17 A. It came down to an issue of our staff was on site  
18 during construction and there was an activity going that  
19 shouldn't have been going on. And there wasn't company  
20 personnel on staff and so our regional person talked  
21 directly to a contractor and that didn't go over well  
22 with the project manager at the time, but we straightened  
23 it out. So as a result of that, there was always a  
24 company staff person on site whenever there was any  
25 construction activity.

1 Q. During what time period was that?

2 A. That would have been 1992 or so.

3 Q. After that personality issue, how did things go?

4 A. Things actually worked pretty well.

5 Q. And after the reclamation of the rail spur or the,  
6 if you will, enhancement of reclamation involving the  
7 rail spur, what other activities were there while you  
8 were still involved with Flambeau Mining Company?

9 A. Again, it was continued monitoring, so they  
10 continued ground water sampling, quarterly sampling and  
11 surface water sampling. At the time I think they were  
12 still conducting fish and macroinvertebrate sampling in  
13 the Flambeau River, biofilter sampling and sampling  
14 various wetlands on the site.

15 I should say, from 1998 through the time I left, a  
16 big part of it was revegetation and augmentation of  
17 revegetation to get to a point where they could submit  
18 their notice of completion. There were very specific  
19 standards that had to be met regarding the vegetation.  
20 And so much of the activity on the site at that time was,  
21 you know, if something was failing, they'd go in and  
22 reseed or they'd irrigate or augment with some soil  
23 supplements, or whatever, to insure that the site was  
24 being revegetated properly.

25 Q. Then were you involved in the certificate of

1 completion process?

2 A. I was not. That all happened after I left.

3 MR. VAN CAMP: Okay. All right. Thank you,  
4 very much. I have no further questions for this witness.

5 CROSS-EXAMINATION

6 BY MS. WESTERBERG:

7 Q. Good afternoon, Mr. Lynch. I'm Christa Westerberg,  
8 one of the attorneys for the plaintiffs. I want to turn  
9 your attention back to your monitoring. This is the  
10 mining permit we were discussing before -- not the mining  
11 permit; the decision that contained the mining permit and  
12 other approvals issued to Flambeau Mining Company in  
13 1991, correct?

14 A. Yes.

15 Q. And I believe you said before, the mining permit was  
16 issued under the authority of the state mining laws which  
17 were then in Chapter 144 of the Wisconsin statutes; is  
18 that right?

19 A. Yes, that's correct.

20 Q. And even though Flambeau Mining Company had a mining  
21 permit, it was still responsible for getting all of their  
22 applicable permits, whether state, federal or local,  
23 correct?

24 A. Yes.

25 Q. And in fact that understanding that Flambeau Mining

1 Company was still responsible for getting all their  
2 applicable permits was reflected in the mining permit;  
3 itself. Specifically one place at paragraph 1 at the  
4 bottom of page WRPC 120?

5 A. Yes. And that simply says that the mining permit is  
6 limited to the authority under 144.80 to 94.

7 Q. And then it goes on to say, "Facilities and  
8 activities regulated under other permits, licenses and  
9 approvals, shall comply with" --

10 A. Mm-mm.

11 Q. Okay. You see that understanding reflected in other  
12 places, such as paragraph 1 of page WRPC 000140 of the  
13 mining permit as well, correct?

14 A. Yes.

15 Q. The mining permit wasn't issued under the authority  
16 of the WPDES program, correct?

17 A. That's right.

18 Q. And the mining permit was not issued under Section  
19 402 of the Clean Water Act, correct?

20 A. Correct.

21 Q. And the mining permit itself did not contain  
22 numeric limits on water discharge effluent for things  
23 like copper and zinc, correct?

24 A. That's right. You mean surface water?

25 Q. Correct. In 1991 Flambeau Mining Company was issued

1 a WPDES permit for discharges through three specific  
2 outfalls, correct?

3 A. Yes.

4 Q. And you see that reflected on the index of the  
5 mining permit shown on the monitor, correct?

6 A. Yes.

7 Q. The WPDES permit was renewed in 1996; is that  
8 correct?

9 A. Yes. They are issued for five years.

10 Q. You mentioned when the decision was made in  
11 approximately early 1998 to regulate storm water  
12 discharge from the industrial outlet through the mining  
13 permit. Did the mining permit, as modified, contain any  
14 effluent limits --

15 A. No.

16 Q. -- for the storm water discharges?

17 A. No, it didn't.

18 Q. It had no numeric limits such as, you know, five  
19 parts per million for copper or anything on that order?

20 A. No.

21 Q. And I think you said before, the primary means of  
22 regulating the storm water discharges were through best  
23 management practices or BMPs?

24 A. Yes.

25 Q. And you said your approach -- the DNR's regulatory

1 approach at that time was to stress surveillance and  
2 monitoring after -- in and after 1998, correct?

3 A. Yes.

4 Q. So that would be surveillance and monitoring of the  
5 BMPs, correct?

6 A. Yes.

7 Q. It wouldn't be surveillance and monitoring of  
8 numeric limits on discharge, correct?

9 A. That's right.

10 Q. Because there were no such requirements; is that  
11 right?

12 A. Right.

13 Q. Okay. And it wouldn't be surveillance and  
14 monitoring of any effluent limits, correct?

15 A. Right. There were no effluent limits.

16 Q. You've never been a member of the program staff in  
17 the DNR's WPDES program, correct?

18 A. I have not.

19 Q. Showing you what's been marked Exhibit 35 in this  
20 case, it's a two-page letter. Is that your signature on  
21 the second page?

22 A. Yes, it is.

23 Q. It's a letter dated March 20th, 1998, correct?

24 A. Yes.

25 Q. And that's the letter where -- is that the letter



1 where you notified Flambeau Mining Company that the DNR  
2 would be regulating storm water discharges from the  
3 industrial outlot through the mining permit?

4 A. Yes, it is.

5 Q. And you had mentioned that it was your understanding  
6 that the Department could regulate discharges under  
7 Section NR 216 of the State Administrative Code, correct?

8 A. Yes.

9 Q. Is NR 216 mentioned anywhere in this letter?

10 A. Not on the first page and it's not on the second  
11 page either.

12 Q. Are you aware of any correspondence the DNR issued  
13 to Flambeau Mining Company in 1998 that specifically  
14 referenced that provision of the Administrative Code,  
15 NR 216?

16 A. It's not in anything that I wrote. I don't believe  
17 it was in any correspondence from our wastewater staff  
18 either.

19 Q. Now, earlier this year you signed an affidavit for  
20 this case; is that correct?

21 A. Yes.

22 Q. Okay. And that affidavit was drafted by attorneys  
23 at Flambeau Mining Company based on your discussions you  
24 had with them, correct?

25 A. That's right. With -- I reviewed it and made

1 revisions and they were incorporated.

2 Q. Sure. And prior to that affidavit, you had never  
3 prepared an affidavit in a case where the DNR was not a  
4 party, correct?

5 A. Not that I recall.

6 MS. WESTERBERG: I'd like to move admission of  
7 Exhibit 35.

8 MR. VAN CAMP: No objection.

9 THE COURT: 35 is received.

10 MS. WESTERBERG: Nothing further. I didn't have  
11 anything further.

12 THE COURT: Thank you. Mr. Van Camp, anything  
13 else?

14 MR. VAN CAMP: Just one moment, Your Honor.

15 (Discussion held off the record.)

16 REDIRECT EXAMINATION

17 BY MR. VAN CAMP:

18 Q. Counsel mentioned the fact that the mining permit  
19 did not have specific effluent limitations as it related  
20 to copper or zinc; do you recall that testimony?

21 A. Yes.

22 Q. During the time that Flambeau Mining Company did  
23 have a WPDES permit, do you recall what the effluent  
24 limitations were that they were permitted to pump with a  
25 pipe directly into the river?

1 A. For --

2 Q. Copper.

3 A. -- copper specifically? It started I believe at 50  
4 and it was revised after some additional information  
5 became available to the Department. I think it was  
6 lowered to 42.

7 Q. And are you aware of any records reflecting  
8 discharges even close to that from the biofilter?

9 MS. WESTERBERG: Object to foundation.

10 THE COURT: Overruled.

11 A. I haven't reviewed the monitoring data since I left  
12 the program. I don't recall the specific numbers.

13 MR. VAN CAMP: Okay. Nothing further. Thank  
14 you.

15 THE COURT: Ms. Westerberg, anything else?

16 MS. WESTERBERG: No, Your Honor.

17 THE COURT: You may step down. Mr. Van Camp,  
18 you may call your next witness.

19 MR. VAN CAMP: At this time I would like to call  
20 Bruce Moore.

21 THE COURT: And this is just for making your  
22 offer of proof, right?

23 MR. VAN CAMP: Yes.

24 MS. MCGILLIVRAY: Thank you, Your Honor.

25 **BRUCE MOORE, DEFENDANT'S WITNESS, SWORN**

1 MS. MCGILLIVRAY: Your Honor, could I just ask  
2 for clarification, I understand this is an offer of  
3 proof, but do we need to make our continued objection or  
4 further objection on this witness?

5 THE COURT: No, no.

6 MS. MCGILLIVRAY: Thank you.

7 THE COURT: They are of record.

8 MS. MCGILLIVRAY: Thank you.

9 THE COURT: Mr. Van Camp.

10 MR. VAN CAMP: Thank you.

11 DIRECT EXAMINATION

12 BY MR. VAN CAMP:

13 Q. Please tell us your name.

14 A. My name is Bruce Moore.

15 Q. Mr. Moore, where do you reside?

16 A. I live in Bayfield, Wisconsin.

17 Q. Are you currently employed?

18 A. I am. I work for the Department of Natural  
19 Resources as a water resources engineer.

20 Q. Please give us a brief post high school education.

21 A. I hold graduate degrees in civil and environmental  
22 engineering and also in environmental monitoring.

23 Q. What position do you hold with the Wisconsin  
24 Department of Natural Resources?

25 A. I currently work as a water resources engineer in

1 the Department storm water program.

2 Q. And where is your office; where do you typically  
3 operate out of?

4 A. My office is in Ashland, Wisconsin.

5 Q. What are your typical duties with the WDNR?

6 A. Within the storm water program, I'm responsible for  
7 making recommendations on implementing the storm water  
8 program for Wisconsin's 18 counties in the north.

9 Q. Are you familiar with the Flambeau Mining Company?

10 A. I am.

11 Q. Are you familiar with the Flambeau Mine site?

12 A. Yes.

13 Q. When is the last time you visited that location?

14 A. The last visit was on April 24th, 2012.

15 Q. What was the purpose of that visit?

16 A. The purpose of the visit was to view the  
17 recently-built infiltration ponds that were part of a  
18 retrofit effort.

19 Q. Prior to visiting the site, were you familiar with  
20 plans related to the infiltration facility?

21 A. Yes.

22 Q. Describe to the Court what your familiarity with  
23 that was.

24 A. There were plans that had been prepared under the  
25 site restoration plan that included retrofitting an

1 existing bioretention pond to an infiltration basin.

2 That also included the two additional infiltration basins  
3 to be constructed.

4 Q. When did you review those plans?

5 A. Those plans were reviewed between the period of my  
6 first site visit, which was on June 27th, 2011, and this  
7 past fall.

8 Q. And what's your understanding of the difference  
9 between an infiltration basin and a biofilter?

10 A. At this site the bioretention device is a lined  
11 feature. Its intention is to retain water and to  
12 minimize ground water interaction with surface runoff  
13 that enters the device. In contrast, an infiltration  
14 basin, as designed for this site, is one where you want  
15 to promote infiltration of runoff into the underlying  
16 soil.

17 Q. In your review of the plans for the infiltration  
18 basins at the Flambeau Mine site, did it appear to you  
19 that this would be the case?

20 A. Yes.

21 Q. What did you find when you went to the Flambeau Mine  
22 site on April 12th?

23 A. At that point in time the -- all three infiltration  
24 basins had been constructed. The banks had been  
25 prepared. An erosion control mat had been placed on the

1 surfaces. There were some issues with the type of  
2 erosion mat that was used on the surface in that there  
3 was the potential for entrapment of amphibians, turtles  
4 and snakes. In fact we had encountered one snake that  
5 had been entangled. The overall construction of the  
6 design of the ponds was complete at that time.

7 Q. And when you studied the design, what was your  
8 understanding regarding the capacity for the infiltration  
9 basins that had been designed?

10 A. The infiltration basins were to retain, at a  
11 minimum, the 100-year storm event, which would be  
12 approximately six inches in a 24-hour period, six inches  
13 of rainfall.

14 Q. Okay. And did you believe that that was adequate?

15 A. Yes.

16 Q. Would you expect any runoff, any overflow, from  
17 those infiltration basins?

18 A. It is unlikely, based on this measure of a  
19 statistical 100-year storm event. In the event that  
20 there were a major atypical storm event, it's conceivable  
21 that there could be overtopping, but it is highly  
22 unlikely.

23 Q. Are you familiar with other infiltration basins?

24 A. Yes.

25 Q. What capacities are they normally designed for?

1 A. Typically they are designed to retain something less  
2 than a hundred-year storm event. Oftentimes the  
3 hundred-year storm event is used in a zine criteria to  
4 insure that you don't have major structural failure if  
5 you had a major storm event.

6 Q. Do you know whether or not the DNR approved the work  
7 plan for the infiltration basins?

8 A. Any approval was done through our mining program in  
9 that that was the regulatory permit that was in place.

10 MR. VAN CAMP: Okay. I don't have anything  
11 further for this witness. Thank you.

12 THE COURT: All right. You may step down. Do  
13 you have any other witnesses?

14 MR. VAN CAMP: Do I have other witnesses?

15 THE COURT: Mm-mm.

16 MR. VAN CAMP: Yes. I would like to call Phill  
17 Fauble.

18 **PHILIP FAUBLE, DEFENDANT'S WITNESS, SWORN**

19 DIRECT EXAMINATION

20 BY MR. VAN CAMP:

21 Q. Good afternoon.

22 A. Good afternoon.

23 Q. Please tell me your name.

24 A. My name is Philip Fauble.

25 Q. Where are you from, Mr. Fauble?



1 A. Currently I reside in Verona, Wisconsin.

2 Q. Are you employed?

3 A. Yes. I'm employed by the Wisconsin Department of  
4 Natural Resources.

5 Q. How long have you been employed by the DNR?

6 A. I have been employed by the DNR since September of  
7 1990.

8 Q. What positions have you held with the DNR?

9 A. Beginning in -- beginning with my employment, I was  
10 hired as a hydrogeologist for the waste and materials  
11 management section. I continued on in that capacity  
12 until 2006.

13 Q. And what happened in 2006?

14 A. In 2006 I was appointed to be the mining coordinator  
15 again for the waste and materials management section.  
16 Actually, it was a combined position. It was both to be  
17 the mining coordinator and the beneficiary use  
18 coordinator.

19 Q. Could you tell me what the position of mining  
20 coordinator involves?

21 A. Yes. Basically, I kind of picked up where Larry  
22 Lynch left off. My responsibility was for the metallic  
23 and nonmetallic mining program. And so my job duties  
24 would include enforcing any of the metallic or  
25 nonmetallic laws as they apply to any sort of facilities

1 within the state of Wisconsin, to inspect these set of  
2 facilities to make sure they were again in compliance  
3 with the laws, and also to review any other new projects  
4 that might come along related to mining, metallic or  
5 nonmetallic mining.

6 Q. I would like to back up for a moment. Could you  
7 tell the Court what your education is?

8 A. Oh. I am -- I have an undergraduate degree,  
9 bachelor's degree, in geology from Eastern Illinois  
10 University and I did graduate studies at Northern  
11 Illinois University.

12 Q. In your employment with the DNR, have you had  
13 occasion to become involved with the Flambeau Mining  
14 project?

15 A. Yes, I have.

16 Q. When did that first occur?

17 A. In a formal sense, it began as soon as I took my new  
18 position as the mining coordinator in 2006.

19 Q. In an informal manner, what involvement did you have  
20 before then?

21 A. Prior to that I had visited the site on at least two  
22 occasions when it was operating. Those were not really  
23 in an official capacity. It was more I was tagging along  
24 with some inspectors just to have a look at the site and  
25 see the operations. Several other different staff had

1 done that just to get a familiarity with the project.

2 Q. Okay. So beginning in 2006, what was your  
3 involvement with the Flambeau Mine site?

4 A. As I described, essentially what I did is I took  
5 over for Larry Lynch, so any of the activities that he  
6 had been involved in then became transferred over to me.

7 As I recall, at the time there was a biofilter  
8 management plan which needed to be reviewed and finally  
9 approved and, also, any of the other inspection duties  
10 that we had to do, reviewing the annual report and  
11 preparing for an anticipated certificate of completion  
12 which we anticipated would be coming in fairly soon.

13 Q. And what did the biofilter management plan involve?

14 A. The biofilter management plan basically, as the name  
15 would imply, was just a plan of how the Flambeau Mining  
16 Company would, on an ongoing basis, manage the biofilter.  
17 So it had things in there about monitoring, continuing  
18 monitoring of it, and the maintenance and the continuing  
19 maintenance of the biofilter area.

20 Q. And what was your involvement in that?

21 A. It was already ongoing when I was hired I think in  
22 August of 2006. And so basically then my involvement in  
23 that was resigning it again for a second time and then  
24 actually issuing an approval in 2007 for that management  
25 plan.

1 Q. Okay. And have you had occasion to monitor that or  
2 to observe the compliance with that plan?

3 A. Yes, I have.

4 Q. And what have you found?

5 A. That FMC has complied with the conditions of the  
6 biofilter management plan.

7 Q. Have you been aware of any other enhancements of the  
8 reclamation at the mining site since you became -- since  
9 your position changed in 2006?

10 A. Could you be more specific about --

11 Q. Right. Do you recall any submissions for work plans  
12 or for activities to address issues that had come up at  
13 the mine site?

14 A. Okay. Specific to the industrial outlot?

15 Q. Yes.

16 A. Okay. Yes. There were several. Mr. Lynch had  
17 mentioned that there was a railroad spur in which they  
18 had identified some elevated levels of copper due to some  
19 spillage and ancillary things during the mining operation  
20 which needed to be remediated. That had been done by the  
21 time I took my position, but there were still some other  
22 areas which were under investigation besides the  
23 railroad spur.

24 FMC then investigated other areas. This was an  
25 ongoing process to see if there were additional areas

1 that had elevated levels of copper besides just the rail  
2 spur. There was a comprehensive -- they did a fairly  
3 comprehensive testing of the area in 2008 which -- excuse  
4 me. There was one that was actually even earlier than  
5 that.

6 They found a hot spot. An area where they had  
7 loaded out some of the railcars had been found to have  
8 elevated levels of copper. So they came in with a work  
9 plan then to address those areas, which were actually in  
10 the parking lot of the -- near the former administration  
11 building. And that proposal came in, we reviewed it, we  
12 had some comments on it and then that was implemented and  
13 there was a removal that was done there.

14 Then again, like I said, there were some further  
15 studies. Some further monitoring had gone on, then there  
16 was a series of things that went on again. And then in  
17 2008 there was a large study that was done and they found  
18 one more area which needed to be remediated and that was  
19 along Copper Park Lane. It was a ditch which had  
20 elevated levels of copper. So FMC again submitted  
21 documentation or submitted a plan to remediate that area  
22 and that was also done.

23 Q. Now, you indicated that investigations were done.  
24 Who actually did the investigations?

25 A. The investigations were done by the Flambeau Mining

1 Company.

2 Q. And when they completed an investigation, did they  
3 share it with the DNR?

4 A. Yes.

5 Q. And how was a plan developed then once an  
6 investigation was completed?

7 A. Once an investigation was completed, they would  
8 inform us that they were conducting an investigation,  
9 they would submit the results. And generally then, as  
10 they submitted the results, they would also submit a  
11 recommendation for a potential remedial action to address  
12 any concerns which had been identified within that  
13 report.

14 Q. What would the DNR do with that?

15 A. We would review that report and then we would  
16 comment on it. If we felt that there might be some  
17 additional measures which needed to be taken or if we  
18 suggest -- if we had any other comments regarding  
19 additional monitoring that should be done or anything of  
20 that nature, then we would respond with a formal sort of  
21 review of what we did and make recommendations.

22 Q. Okay. How did you find Flambeau Mining Company when  
23 you submitted, say, comments or additional requirements?

24 MS. WESTERBERG: Objection. Form.

25 THE COURT: Overruled.

1 A. I found the Flambeau Mining Company to be  
2 cooperative in their efforts.

3 Q. In taking over the job that Larry Lynch had, did  
4 that involve reviewing mining permits that the company  
5 had?

6 A. In the course of my job, of course I had to review  
7 and familiarize myself with the permits that had been  
8 issued previously so that I knew exactly what conditions  
9 we needed to be enforcing and what our authorities were.

10 Q. And to the extent that you became familiar with  
11 those permits and things, did you ever find Flambeau in  
12 violation of any of those permits?

13 A. No.

14 Q. Were you involved at all in the decision made in  
15 1998 to regulate storm water discharges through the  
16 mining permit?

17 A. No.

18 Q. When you took over did you understand that the storm  
19 water was being managed under the mining permit?

20 A. Yes.

21 Q. So when about did you become aware of that?

22 A. Probably soon after I took the position in 2006, I  
23 was briefed on it by our attorney, Chuck Hammer, who  
24 basically then sat down and we went through the mining  
25 permit and if we had any questions. And he kind of

1 explained to me some of the history since he had been  
2 involved in that and how we regulated the mine.

3 Q. And did it continue after you took over, that is,  
4 did the discharges from the biofilter continue to be  
5 regulated after you sort of took charge of the Flambeau  
6 Mine project under the mining permit?

7 A. Yes. It continued again in the same fashion that it  
8 had been regulated before.

9 Q. And was that satisfactory to you?

10 A. I'm not quite sure how to answer that. That's the  
11 law. That's the way we were interpreting it and that's  
12 the way we were doing it.

13 Q. Okay. And did you believe that that was complying  
14 with Wisconsin law?

15 A. Yes.

16 Q. Are you familiar with Wisconsin NR 216?

17 A. Yes, I am. I'm not -- I'm not an expert on it. I  
18 couldn't tell you exactly the wording, but I am familiar  
19 with it, yes.

20 Q. Are you aware of any other facilities, other than  
21 Flambeau Mining Company, that's regulated under NR  
22 216.21?

23 A. The reason I was familiar with it was in my previous  
24 position as a hydrogeologist with the waste and materials  
25 management system, I regularly was in charge of



1 permitting municipal landfills, municipal solid waste  
2 landfills. Under our permitting authority under NR 500  
3 for the siting and the permitting of municipal solid  
4 waste landfills, they also were considered to fall  
5 underneath that section of NR 216.

6       So for municipal solid waste landfills, when we were  
7 doing a feasibility approval or a plan of operation, we  
8 would, when we got the plans in, we would share them with  
9 the storm water staff. They would look over those plans,  
10 they would give us a recommendation for conditions or  
11 approvals and then we would incorporate those into our  
12 plan of operation approvals for municipal solid waste  
13 landfills. They did not get a separate storm water  
14 permit.

15 Q. And by "a separate storm water permit," what are you  
16 referring to?

17 A. Any conditions in order to address storm water  
18 management on a solid waste disposal facility would be  
19 incorporated into our plan of operation for that facility  
20 and would be enforced through that mechanism so that  
21 there would not be a standalone storm water permit.

22 Q. And when you're talking about a standalone storm  
23 water permit, you're talking about some sort of a PDS  
24 permit?

25 A. Yes.

1 Q. And so these waste facilities would have storm water  
2 discharges, correct?

3 A. Yes.

4 Q. And those would be permitted, if I understood you,  
5 under NR 216?

6 A. They would be permitted under our authorities under  
7 NR 500. What I'm saying is, under 216 then, that would  
8 be considered an equivalent as long as it was as  
9 protective and as stringent as it would be for the  
10 requirements under 151. Then we would incorporate those  
11 and we would regulate those through authority through the  
12 plan of operation.

13 Q. During what period of time or is it continuing today  
14 that you have responsibilities with regard to Flambeau  
15 Mining Company?

16 A. I have -- I currently do have responsibility for  
17 overseeing the Flambeau Mine permit.

18 Q. Okay. And so have those basically been the same  
19 since 2006?

20 A. Yes.

21 Q. During that time has it been necessary for the DNR  
22 to bring any enforcement actions against the mining  
23 company?

24 A. No.

25 Q. During that period of time did you find that they

1 were complying with the permits that they had?

2 MS. WESTERBERG: Object. Asked and answered.

3 THE COURT: Overruled.

4 A. Yes.

5 Q. Is it fair to say that the Flambeau Mining Company  
6 cooperates with the Wisconsin DNR, as far as you are  
7 aware?

8 A. I found them to be cooperative, yes.

9 MR. VAN CAMP: No further questions for this  
10 witness.

11 THE COURT: Ms. Westerberg.

12 MS. WESTERBERG: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. WESTERBERG:

15 Q. Good afternoon Mr. Fauble I'm. Christa Westerberg  
16 one, of the attorneys for the plaintiffs.

17 A. Good afternoon.

18 Q. In your checking compliance, Flambeau Mining  
19 Company's compliance with applicable permits, one of the  
20 major sources that you rely on is Flambeau's annual  
21 reports, correct?

22 A. That is true.

23 Q. As well as Flambeau's own reclamation annual  
24 reports, correct?

25 A. Yes.

1 Q. You've done periodic site visits, correct?

2 A. Yes.

3 Q. In so far as the outlot goes, you're checking to see  
4 if they're complying with BMPs, correct?

5 A. Yes.

6 Q. Not any sort of numeric effluent limits on storm  
7 water discharges, correct?

8 A. No.

9 Q. Did anyone from Flambeau ever inform you that they  
10 thought they might require any sort of WPDES permit for  
11 discharges to Stream C?

12 A. I'm guessing -- are you asking me, did FMC ever  
13 approach me and say -- and ask that they -- did they need  
14 a permit; is that what you're saying, basically?

15 Q. Yes.

16 A. Okay. No.

17 Q. Do you know if the U.S. EPA has approved how the DNR  
18 regulates storm water runoff from landfills?

19 A. No.

20 Q. You have never worked in the DNR's WPDES permit  
21 program, correct?

22 A. No.

23 Q. Those are --

24 MR. DAWSON: Point of clarification. The last  
25 word in the question was the word *correct*. Mr. Fauble

1 said, "No." Could we have clarification? Did you mean  
2 to say no, it is not correct, or it is correct?

3 THE COURT: You may have clarification  
4 Ms. Westerberg, would you frame the question again?

5 MS. WESTERBERG: I will, Your Honor.

6 BY MS. WESTERBERG:

7 Q. Have you ever worked in the DNR's WPDES permit  
8 program?

9 A. No, I have not.

10 Q. Thank you. You've submitted three declarations in  
11 this case; is that correct?

12 A. Yes.

13 Q. And those are on behalf of Flambeau Mining Company,  
14 correct?

15 A. Yes, they were.

16 MS. WESTERBERG: Nothing further, Your Honor.

17 THE COURT: Thank you. Anything else,  
18 Mr. Van Camp?

19 MR. VAN CAMP: Not for this witness. Thank you.

20 THE COURT: You may step down. And he's free to  
21 leave, I assume?

22 MR. VAN CAMP: I'm sorry. Yes.

23 THE COURT: He is free to leave? Okay.

24 MR. VAN CAMP: Call Mr. Bertolacini.

25 **JAMES BERTOLACINI, DEFENDANT'S WITNESS, SWORN**

DIRECT EXAMINATION

1  
2 BY MR. VAN CAMP:

3 Q. I understand I may have mispronounced your name.  
4 Could you please pronounce your name?

5 A. I pronounce it James Bertolacini.

6 THE COURT: Let's hear you do that.

7 MR. VAN CAMP: Pardon me?

8 THE COURT: Let me hear you do that.

9 BY MR. VAN CAMP:

10 Q. Bertolacini. Close?

11 A. That's how we pronounce it, yes.

12 Q. Mr. Bertolacini, tell me, first of all, where do you  
13 live?

14 A. I'm lucky enough to live in the Marquette  
15 neighborhood on Madison's east side.

16 Q. And are you employed?

17 A. Yes, I am. I'm employed with the Wisconsin  
18 Department of Natural Resources.

19 Q. What is your position with the Department?

20 A. I am currently the soil and water program  
21 coordinator, a position I've held since 2006.

22 Q. Did everybody in the Department change positions in  
23 2006? Sorry.

24 A. Just the ones in the mining, I'm assuming.

25 Q. Okay. I would like to back up.

1 A. Sure.

2 Q. And, if you would, please tell the Court what your  
3 educational background is, please.

4 A. I have a Bachelor of Arts degree from Indiana  
5 University in biology and a Master of Science in  
6 environmental science from Indiana University, 1990.  
7 1994 on the bachelor degree.

8 Q. And what employment have you had since you received  
9 your master's degree?

10 A. For a time I lived in Chicago. I worked for a  
11 couple of environmental consulting firms. One was called  
12 *Ecology & Environment*. The other one was Harza  
13 Engineering. And then that would have been for, like, I  
14 think 1990 to '92. And then I moved to Madison and  
15 started my employment with the Department of Natural  
16 Resources.

17 Q. What type of work did you do with those firms in  
18 Chicago?

19 A. For the Ecology & Environment, we looked at -- we  
20 did, like, preliminary assessments on potential Superfund  
21 sites. At Harza Engineering I worked in their  
22 environmental permitting section.

23 Q. And was it after that that you began working with  
24 DNR?

25 A. Yes. I started working with the Department of

1 Natural Resources in November of 1992 initially as a  
2 limited-term employee in the recycling program, getting  
3 that program up and running. And then in 1994 I  
4 transferred to the storm water program helping to begin  
5 implementation of the -- specifically the construction  
6 site permit program.

7 And then in -- I was, what we like to term, *reorged*.  
8 we went through reorganization in the late 90s, 1998 or  
9 so. I started working at the DNR South Central Office,  
10 our regional office in Fitchburg, as a storm water  
11 management specialist.

12 Q. So is it fair to say that you've been involved, in  
13 one way or another, in storm water management since 1994?

14 A. Yes.

15 Q. And in the various positions you've described, what  
16 was your -- what were your responsibilities regarding  
17 storm water management?

18 A. In 1994 to 1998, again I was in the Central Office  
19 in Jeff 2. I was brought on to help get the construction  
20 site permit program off the ground as far as beginning  
21 implementing that new program at that time.

22 In 1998, again there was reorganization where the  
23 idea was to get more people out into the field, so I took  
24 a position in Fitchburg to be the regional storm water  
25 specialist to implement the program in the eleven-county



1 area at that time in Southern Wisconsin.

2 Q. When you say that there was a new program that you  
3 were getting off the ground involving storm water, what  
4 was that about?

5 A. The new program in the sense of 1994 is when the  
6 state's storm water regulations under NR 216 first went  
7 into effect.

8 Q. Tell us, just generally, what is NR 216 about.

9 A. NR 216 is an Administrative Code that spells out the  
10 requirements for application and the permit requirements  
11 for storm water discharges, specifically certain  
12 municipalities, industrial facilities and construction  
13 sites.

14 Q. And then, as I understand it, after you began  
15 working to get the NR 216 program up and running, in 1998  
16 you began working in a different position that involved  
17 construction sites?

18 A. Not just construction sites. In 1998 my position in  
19 the Fitchburg office was dealing with all three of those  
20 programs I mentioned -- municipal, industrial and  
21 construction.

22 Q. Okay. Could you describe how, generally, storm  
23 water runoff is regulated in the state of Wisconsin?

24 A. Well, again, there's the three subchapters in NR  
25 216. Under state law, the Department was required to

1 develop administrative rules to regulate certain storm  
2 water discharges. In the municipal subchapter, a  
3 municipality that's identified as needing a permit needs  
4 to develop certain programs and implement certain  
5 processes and procedures in their operations of their  
6 municipality to regulate discharges of storm water to  
7 their municipal storm water system. And that's done  
8 either through individual permits or general permits.

9 Industrial storm water, depending on the type of  
10 industrial activity identified by the Standard Industrial  
11 Classification Code, NR 216 identifies the types of  
12 industries that do need storm water permits and are  
13 divided up into two different tiers, Tier 1 and Tier 2;  
14 Tier 1, heavy manufacturing; and Tier 2, facilities are  
15 considered light manufacturing for the purposes of NR  
16 216.

17 And that subchapter on industrial facilities spells  
18 out the requirements for applying for a permit in  
19 developing a storm water prevention plan and what kind of  
20 best management practices or what kind of considerations  
21 for addressing potential contamination of storm water  
22 should occur at the facility. And those, Tier 1 and --  
23 the Tier 1 and Tier 2 permits are general permits.

24 Subchapter 3 involves construction. Currently, any  
25 land disturbance affecting one or more acres requires a

1 storm water permit and the developer is required to have  
2 erosion control and a storm water management plan to meet  
3 certain standards in the NR codes.

4 Q. What is the relationship between the Wisconsin  
5 regulation of storm water and the federal regulation of  
6 storm water?

7 A. Well, under the Clean Water Act, the entities I just  
8 mentioned -- certain municipalities, industrial  
9 facilities and construction sites -- are required to get  
10 a storm water permit, so that's parallel there. And  
11 states that are delegated to administer WPDES permits on  
12 behalf of the federal government are required to  
13 implement the procedures in the Clean Water Act to  
14 address storm water discharges from the same kind of  
15 facilities.

16 Q. Now, we've been talking in this case about either  
17 PDES permits or WPDES permits. And what do they have to  
18 do with storm water?

19 A. Well, NPDES stands for *National Pollutant Discharge*  
20 *Elimination System*. WPDES stands for *Wisconsin Pollutant*  
21 *Discharge Elimination System*. Those are programs that  
22 have been developed to regulate the discharge of  
23 wastewater from certain facilities.

24 And there's what's somewhat termed *traditional*  
25 wastewater, things like discharges from wastewater

1 treatment plants that have been regulated for many years.  
2 In the late 80s, the Clean Water Act was amended to  
3 include storm water discharges as regulated, under  
4 certain circumstances, as regulated wastewater  
5 discharges.

6 Q. So how long have you been involved in either  
7 reviewing applications -- well, let's say -- just let's  
8 start with that, reviewing applications from various  
9 entities for PDES permits or WPDES permits.

10 A. I don't review applications too much anymore. But  
11 when I first started in the program in 1994, and during  
12 my time in the Fitchburg office from '92 to 2006, I  
13 reviewed applications under all three of those  
14 subchapters.

15 Q. And tell us what you do in your position now.

16 A. Well, as program coordinator, I'm responsible for  
17 coordinating the implementation of the Wisconsin storm  
18 water program. I help or I develop guidance and policy  
19 and training materials for both internal and external  
20 parties. I consult with the Environmental Protection  
21 Agency on storm water issues and I answer a lot of  
22 questions about storm water from the public.

23 Q. With regard to NR 216, are you familiar with NR  
24 216 -- I'm sorry -- NR 216.21?

25 A. Yes.

1 Q. What can you tell us about NR 216.21?

2 A. Well, NR 216.21 specifies the types of facilities  
3 that need, based on their SIC code, that need storm water  
4 permits. There are also some other facilities that are  
5 listed in that section. It also includes the, for Tier 1  
6 and Tier 2, it also includes the -- currently includes  
7 the language for getting what's called a *no exposure*  
8 certification. It also contains the language that was  
9 referred to about other environmental programs.

10 Q. Okay. And what does that -- what does that mean,  
11 that you referred to in other environmental programs;  
12 what are you referring to there?

13 A. There is a provision in NR 216, NR 216.214, that  
14 permits the Department to cover a discharge, a storm  
15 water discharge, under some other environmental program  
16 if the activity is -- if it's being handled in a manner  
17 similar or more stringent than a storm water permit.

18 Q. Okay. Are you aware of any examples of that?

19 A. I'm aware of the situation that Mr. Fauble  
20 explained, the solid waste landfills and the Flambeau  
21 Mine.

22 Q. Have you had any direct involvement in reviewing the  
23 permits regulating the Wisconsin -- I'm sorry -- the  
24 Flambeau Mining Company discharges from the biofilter?

25 A. I have never looked at that document.

1 Q. Okay. You described Tier 1 and Tier 2 general  
2 permits.

3 A. Right.

4 Q. Could you tell us what those are?

5 A. Well, we broke our program up into tiers in the  
6 first part of the -- when the program was first under  
7 development. We were developing the general permits.  
8 The Tier 1 permit again is what we apply to what we term  
9 *heavy industry*. It has the same requirements as the  
10 Tier 2 as far as a storm water pollution prevention plan,  
11 but it requires chemical monitoring for the first two  
12 years of permit coverage and it requires the submittal of  
13 a report the first two years of permit coverage.

14 The Tier 2 permit is for what is considered light  
15 manufacturing. They don't have the sampling, the  
16 two-year sampling, or the report submittal, but they  
17 are -- permittees under that permit are required to have  
18 a storm water pollution prevention plan.

19 Q. Are the Tier 1 and Tier 2 permits considered WPDES  
20 permits?

21 A. Yes.

22 Q. And who has the authority to issue those permits?

23 A. The Department of Natural Resources.

24 Q. Here in the state?

25 A. Yes.

1 Q. And how is it determined whether a pier one -- I'm  
2 sorry -- a Tier 1 or a Tier 2 permit is issued, say, for  
3 a particular facility?

4 A. It's based on the language in the code and where  
5 they fit into the program.

6 Q. Okay. And with regard to the Flambeau Mine site,  
7 you are probably familiar by now with the fact that there  
8 is something called the *industrial outlot* in that,  
9 correct?

10 A. After being here for a few days, yes, I'm familiar  
11 now, yes.

12 Q. And your understanding of that is what? Just give  
13 me your general understanding of what was involved in the  
14 industrial outlot.

15 A. Okay. My general understanding, based on what I've  
16 heard, is that there is an area of the Flambeau Mine  
17 property where there were some buildings that were built  
18 during the course of operating the mine that are still  
19 remaining, I believe at the southern end of the property,  
20 that either are empty or are being leased to other  
21 parties. There's a parking lot associated with it and  
22 there is a, or at least what used to be, a biofilter that  
23 accepted and treated runoff from that area. I hope  
24 that's a good characterization of what is occurring.

25 Q. Given your work with the DNR in the storm water

1 program, given the description that you have just told  
2 us, what type of -- if the Department were going to be  
3 issuing that facility some sort of a WPDES permit, what  
4 type of WPDES permit would be required?

5 A. Are you asking about the outlot that currently  
6 exists or --

7 Q. Yes.

8 A. -- the whole sited when it was --

9 Q. No. There's a certificate of completion for the  
10 rest of the site.

11 A. Okay.

12 Q. I'm only talking about the industrial outlot?

13 MR. SAUL: Your Honor, I'm going to object. It  
14 calls for speculation and calls for a legal opinion.

15 THE COURT: Well, he can say what he would do in  
16 his position and I think that's -- that's appropriate.

17 THE WITNESS: Your Honor, we are, as staff, we  
18 are asked quite often to advise people on whether they  
19 need permits or not. So I feel I can say that, you know,  
20 based on what I know about what is occurring at this  
21 area, I haven't heard anything that suggests that there's  
22 any mining activity still occurring. We permit  
23 industrial facilities based on the kind of activity  
24 that's occurring in that facility.

25 For example, a cheese manufacturing facility, based



1 on their SIC code, they are brought into the permit  
2 program based on that activity. So if they're  
3 manufacturing cheese or, you know, some other type  
4 product, then if they're required to get a storm water  
5 permit under our code, then we, you know, cover them  
6 under that permit.

7 THE COURT: I'll let Mr. Van Camp ask the  
8 question then.

9 BY MR. VAN CAMP:

10 Q. Okay. We will be even more specific. One of the  
11 major tenants in a building at this site is the DNR.

12 A. Unless the DNR is manufacturing something or listed  
13 in the code in some way, we would not issue a permit to  
14 the DNR for that facility.

15 Q. Okay. So for the entire industrial outlot and for  
16 this biofilter that used to exist wherein storm events  
17 there could be a discharge, based on your experience with  
18 the DNR, what type of permit, if any, would be required  
19 under -- what type of WPDES permit, if any, would be  
20 required for that facility?

21 A. Well, based on what I know about the current  
22 tenants, I can't name any of the -- either the Tier 1 or  
23 Tier 2 that would be -- that would receive a permit. I  
24 think I've heard the DNR and then a municipal facility  
25 and then an empty wastewater treatment plant is what I've

1 heard is occurring there.

2 Q. So if they -- if Flambeau Mining Company came to you  
3 for advice about whether or not they would require for  
4 this facility, including storm water running off into  
5 this biofilter which occasionally discharged, what would  
6 you tell them about whether they needed to apply for and  
7 obtain a WPDES permit?

8 A. Well, I would ask -- I would want to first know what  
9 specific industrial activity is occurring in that area or  
10 in those facilities.

11 Q. I'm going to ask you to assume that there is no  
12 manufacturing going on.

13 A. Then I can't think of a storm water permit that  
14 would apply to the current situation there.

15 Q. Under that circumstance, since a storm water permit  
16 wouldn't apply to that circumstance, what effluent limits  
17 would there be on discharges from the runoff that went  
18 into the biofilter and occasionally overflowed?

19 MR. SAUL: Objection. Lack of foundation and  
20 calls for a legal conclusion.

21 THE COURT: Overruled.

22 A. What effluent limits?

23 Q. Yeah.

24 A. Numeric effluent limits?

25 Q. Yes. Would there be any?

1 A. We don't have numeric effluent limits in our storm  
2 water permits -- industrial storm water permits.

3 Q. So if you don't have effluent limits in your storm  
4 water permit program, what process is followed to control  
5 or to regulate storm water runoff?

6 A. As I mentioned earlier, there's the requirement to  
7 develop a storm water pollution prevention plan that  
8 requires the permittee to develop drainage maps, to  
9 identify potential sources of contamination, to identify  
10 the best management practices that would be used to treat  
11 storm water. There are situations where things could be  
12 more complex for the facility where they might need to do  
13 something more than just BMPs and housekeeping, but  
14 that's the typical situation for a permitting.

15 Q. From what you've heard about the regulations in the  
16 Wisconsin mine permit, would you say that that is at  
17 least as equivalent to any permit that would be needed  
18 about storm water from NR 216?

19 MR. SAUL: Objection. Lack of foundation.

20 THE COURT: Overruled.

21 A. Well, Mr. Van Camp, as I said earlier, I have not  
22 reviewed the mining permit. I don't know exactly what's  
23 in that permit. But based on what I heard from both  
24 Mr. Lynch and Mr. Fauble, I'm not sure what the storm  
25 water general permit would require beyond that permit

1 that they have from the state already.

2 Q. Okay. Now, as I understand it, the state of  
3 Wisconsin is today a fully -- has responsibility, a fully  
4 delegated state, by the -- under the Clean Water Act from  
5 the EPA; is that correct?

6 A. As far as fully, I can't speak for the other WPDES  
7 programs that I don't work in. But for the storm water  
8 program, EPA recognizes the state of Wisconsin, the  
9 Department of Natural Resources, as the permitting  
10 authority for storm water.

11 Q. Are you aware of a letter or a submission for  
12 approval of NR 216 to the EPA?

13 A. I am not.

14 Q. Are you aware of a letter sent by the EPA commenting  
15 on NR 216?

16 A. A letter? I'm aware of documents that we have where  
17 they have commented on NR 216.

18 Q. Okay. And what is that? What is involved in that  
19 process?

20 A. Well, when the NR 216 was first being drafted, we  
21 have what's called a *Green Sheet Package*. It's only  
22 referred to as a *Green Sheet Package* because the front  
23 page is on green paper so that our Natural Resources  
24 Board knows that it's a document requiring some kind of  
25 action on an administrative rule.

1           That is -- and that Green Sheet Package outlines --  
2 is a manner of presenting either a draft rule or a rule  
3 that is being proposed for final adoption to the Natural  
4 Resources Board. That document needs to address some of  
5 the fiscal impacts of the rule. It needs to document  
6 what kind of public comments were received on the rule.  
7 It needs to have a draft of the rule that's being  
8 proposed attached to it. And that is signed by the  
9 secretary of the agency.

10 Q.    And then when you received documents from the EPA  
11 with comments about that rule, what is done at the  
12 Department level with those comments?

13 A.    Well, we usually receive comments from a lot of  
14 different interests, you know, business interests,  
15 concerned citizens. But we are required to signet those  
16 rules to EPA to look -- at least rules that are based on  
17 a federal program. And what we do is we consider those  
18 comments, we might do some back and forth on what their  
19 comments might be, but we attempt to satisfy their  
20 concerns and -- prior to finalizing the rule.

21 Q.    Okay. During that back and forth process that you  
22 just described, does the DNR continue to be the delegated  
23 authority in the state of Wisconsin?

24           MR. SAUL: Objection. Calls for a legal  
25 conclusion.

1 THE COURT: Sustained.

2 BY MR. VAN CAMP:

3 Q. Does -- okay. That comment period is going on now,  
4 correct, or that back and forth?

5 A. Well, the rule is not -- there's a draft rule out  
6 there right now for comment. What I meant was when  
7 NR 216 was first promulgated, it went through that  
8 process. And then there were some amendments made in the  
9 early 2000s, it went through that process again.

10 Q. And between -- well, when did the WDNR first begin  
11 issuing WPDES permits?

12 A. Storm water permits?

13 Q. Yes.

14 A. In 1994.

15 Q. And has the authority of the state of Wisconsin to  
16 issue those permits been taken away anytime since then?

17 MR. SAUL: Objection. Calls for a legal  
18 conclusion.

19 THE COURT: Overruled.

20 A. Not that I'm aware of.

21 Q. Have they continuously done it since that time?

22 A. "They" being the --

23 Q. The Department. Has the Department, since that  
24 time, continuously issued WPDES storm water permits?

25 MR. SAUL: Objection, vague. Objection, assumes

1 facts not in the record.

2 THE COURT: Sustained.

3 BY MR. VAN CAMP:

4 Q. Is the Wisconsin DNR issuing WPDES permits today?

5 A. You've got to be a little careful. Issuing is --  
6 like, a general permit is issued when it's written and  
7 finalized and it becomes the general permit that applies  
8 to a broad -- different categories of discharges. What  
9 is occurring probably today as we speak, we confer  
10 coverage to facilities and construction sites, whoever is  
11 required to get a permit. Yes, we do that on a daily  
12 basis.

13 MR. VAN CAMP: Okay. Thank you, very much. I  
14 have no further questions for this witness.

15 THE COURT: Mr. Cassidy.

16 CROSS-EXAMINATION

17 BY MR. SAUL:

18 Q. Good afternoon Mr. Bertolacini. My name is James  
19 Saul. I'm one of the attorneys for the plaintiffs.

20 During your testimony you described the federal-state  
21 relationship and you were talking about implementation of  
22 federal Clean Water Act requirements. And I believe your  
23 testimony was that the state is required to implement the  
24 federal Clean Water Act requirements; is that accurate?

25 A. I did not say that.

1 Q. Do you know if EPA has approved the use of Wisconsin  
2 state mining permits in lieu of NPDES permits?

3 A. I don't know whether they ever looked at that  
4 permit.

5 Q. Do you know if they have expressly approved the use  
6 of non-NPDES permits for municipal landfills?

7 A. I don't know whether they have looked at that  
8 decision.

9 Q. Have you reviewed Flambeau Mining Company's  
10 discharge monitoring data from the biofilter?

11 A. I have not.

12 Q. So you don't know if those discharges comply with  
13 water quality standards?

14 A. What water quality standards are you referring to?

15 Q. The water quality standards that would apply to the  
16 receiving waters; for example, standards for copper or  
17 for zinc.

18 A. I don't know that, no.

19 Q. Would that be something that would be relevant to  
20 your consideration of what type of WPDES permit would be  
21 appropriate for that type of discharge?

22 A. Based on what I know about the kind of activity and  
23 the kind of permits we have, the appropriate permit would  
24 be a Tier 2 industrial storm water permit, general  
25 permit. That's what the code says.



1 Q. Does the Wisconsin DNR issue individual storm water  
2 WPDES permits?

3 A. I know that there's -- obviously there's the  
4 provision in our code for that to occur. But whether we  
5 do that on a regular basis, I'm not aware that we do.

6 Q. Are you aware of any industrial facility that has  
7 received an individual storm water WPDES permit?

8 A. Not just for storm water, no.

9 Q. Are you aware that -- well, first of all, are you  
10 familiar with Stream C at the Flambeau Mine site?

11 A. No.

12 Q. How long does it take to process an application for  
13 a storm water WPDES permit?

14 A. Industrial?

15 Q. Yes.

16 A. It takes a matter of just a day or two. It can  
17 take, you know, longer, depending on the issues with the  
18 facility. It's industry specific. It's specific to the  
19 situation.

20 MR. SAUL: No further questions, Your Honor.

21 THE COURT: Thank you. Anything else,  
22 Mr. Van Camp?

23 MR. VAN CAMP: Nothing else for this witness.

24 THE COURT: You may step down. We will adjourn  
25 for the evening, but before we do, I want to get some

1 sort of idea about how close we are to the end.

2 MR. VAN CAMP: I have three witnesses.

3 THE COURT: Do you think they will be fairly  
4 brief or extended?

5 MR. VAN CAMP: In the general scheme of things,  
6 they will be fairly brief.

7 THE COURT: All right.

8 MR. VAN CAMP: One of them will be a bit longer  
9 than the others, but I would expect that I will be  
10 finished before noon tomorrow.

11 THE COURT: And have you told Ms. -- I can tell  
12 by the way you're -- what three are you calling tomorrow?

13 MR. VAN CAMP: I will be calling  
14 Drs. Fairbrother and Burton and I will probably be  
15 calling Jana Murphy.

16 THE COURT: All right. And, Ms. McGillivray,  
17 how many witnesses do you expect to put in tomorrow  
18 afternoon?

19 MS. MCGILLIVRAY: Your Honor, depends on how  
20 tomorrow goes, but at this point I should probably confer  
21 with counsel. Depends how tomorrow goes, as I was  
22 saying. At this point, we don't think that we will have  
23 a need to call any additional witnesses in the penalty  
24 phase. I did want to clarify, Mr. Van Camp had put  
25 Mr. Donohue on his list for today and we didn't get to

1 him and I'm wondering if that's three plus Mr. Donohue  
2 for tomorrow.

3 MR. VAN CAMP: We have Mr. Donohue *in pocket*,  
4 shall we say, but I am not expecting to need to call him  
5 unless an issue arises on cross-examination related to  
6 the wells or the -- something related to the site.

7 MS. MCGILLIVRAY: Thank you. Your Honor, one  
8 other matter that counsel just reminded me of. I just --  
9 I said we weren't calling any additional witnesses, but I  
10 just want to clarify, our understanding is that our  
11 liability evidence can be used also in the penalty phase  
12 to the extent relevant.

13 THE COURT: Absolutely. Yes. We don't need to  
14 hear those witnesses all over again.

15 MS. MCGILLIVRAY: That's why I didn't want to  
16 recall them on those same issues.

17 THE COURT: All right.

18 MS. MCGILLIVRAY: Okay. I'm getting some more  
19 motion from the back. Your Honor, because this is a  
20 court trial, will you be asking for post-trial briefing  
21 or should we be prepared to give closing argument  
22 tomorrow at the end of -- after defendants rest?

23 THE COURT: I don't think that I need any  
24 post-trial briefing. There have been extensive briefs at  
25 earlier stages of this case. If you wanted to give a

1 short summation at the end of the evidence, that would be  
2 fine. And I also have the briefs on the motions for  
3 judgment as a matter of law.

4 MS. MCGILLIVRAY: I was going to ask, Your  
5 Honor, also about that if we were to do post-trial  
6 briefing if we could combine those into one. But if  
7 we're just responding to that, I see that in defendant's  
8 motion they had an opportunity to cite to the transcript  
9 because they have realtime transcripts, and I'm wondering  
10 if we could begin our responsive time from the date in  
11 which the public transcript is available.

12 THE COURT: Your responsive time?

13 MS. MCGILLIVRAY: We received a scheduling order  
14 on the brief on the motion to dismiss.

15 THE COURT: Oh, I thought you had filed  
16 something in response to that already.

17 MS. MCGILLIVRAY: Well, if we did -- I'm not  
18 sure we did, since we're all here.

19 MR. VAN CAMP: We've filed that, also.

20 THE COURT: I thought I had seen something.  
21 Yes. You can talk to the court reporter about when those  
22 will be ready, but it will be a very short time after  
23 that.

24 MS. MCGILLIVRAY: That's fine. Thank you, Your  
25 Honor.

1 THE COURT: We can talk about that tomorrow.

2 Okay. Anything else?

3 MS. MCGILLIVRAY: No. Thank you, Your Honor.

4 THE COURT: Court will adjourn.

5 MR. VAN CAMP: Thank you.

6 (Adjourned at 5:35 p.m.)

7 \*\*\*

8 I, CHERYL A. SEEMAN, Certified Realtime and  
9 Merit Reporter, in and for the State of Wisconsin,  
10 certify that the foregoing is a true and accurate record  
11 of the proceedings held on the 24th day of May, 2012,  
12 before the Honorable Barbara B. Crabb, of the Western  
13 District of Wisconsin, in my presence and reduced to  
14 writing in accordance with my stenographic notes made at  
15 said time and place.  
16 Dated this 11th day of September, 2012.

17

18

/s/

19

Cheryl A. Seeman, RMR, CRR  
Federal Court Reporter

20

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